In the Supreme Court of the United States

OCTOBER TERM, 1921.

No. 563

THE STATE OF TEXAS AND C. M. CURETON, PERSONALLY AND AS ATTORNEY GENERAL FOR THE STATE OF TEXAS, APPELLANTS.

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISION, H. M. DAUGHERTY, ATTORNEY GENERAL OF THE UNITED STATES, EASTERN TEXAS RAILROAD COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, AND ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS, APPELLEES.

BRIEF OF APPELLEES, EASTERN TEXAS RAILROAD COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS.

E. B. PERKINS,
DANIEL UPTHEGROVE,
E. J. MANTOOTH,

Solicitors for Appellees, St. Louis Southwestern Railway Company; St. Louis Southwestern Railway Company of Texas; and Eastern Texas Railroad Company.

Warlick, the Expert Law Printer of Texas, Dallas

CASES AND AUTHORITIES CITED

SUBJECT INDEX

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STATEMENT OF THE CASE

The statement of the case as made by appellant is accepted as far as it goes; and the following additions are made thereto:

The State sues as a sovereign State and alleges no facts other than general statements as to the territory where the lines of railway of the Eastern Texas Railroad Company are

situated, the population, production, business and industries of that territory, and general statements and predictions as to the effect the abandonment of the railroad would have upon the people in the territory and their commerce and industries. To these are added predictions as to the probable future of the development of the territory.

Then the State pleads a synopsis of the provisions of the Constitution and Statutes of the State applicable to creation, control and regulation of railroad transportation and the conduct of railroad companies.

C. M. Cureton, Attorney General of the State, joins with the State in the suit, but no allegations are made with reference to him except his authority as Attorney General, and we conclude that he sues in his official capacity only.

Following these allegations, appellants allege (Petition paragraph XXVI; Tr. pp. 17-18) that Section 402 of the Transportation Act of 1920, particularly subdivisions 18, 19, 20, 21 and 22 of said Section, violates the Constitution of the United States. These objections and paragraphs setting forth the reasons of appellants as to why the same are unconstitutional assign numerous reasons therefor. (Tr. pp. 19-20).

It will be observed that this summary of reasons why the paragraphs of the Transportation Act referred to are unconstitutional, raise the question of the reserve powers of the State; power conferred upon Congress to regulate commerce; prohibition of suits against the State; infringement upon the authority of the Judicial branch of the Government; and violation of the Fifth Amendment, which prohibits the

taking of property without due process of law.

Appelants then, in the XXIII paragraph of their petition (Tr. p. 24) allege that unless restrained, the Eastern Texas Railroad Company will abandon its line of railway and dismantle the same under the authority of the Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commision on December 2, 1920. This Certificate, together with report of the Commision upon which the Certificate is based, is attached as "Exhibit 'A' " to the petition and made a part thereof (Tr.pp. 27-32 inclusive). The report of the Commision contained in said Exhibit (begining at page 27 and ending on page 31) sets forth the facts found by the Commision on a hearing of the Application filed by the Eastern Texas Railroad Company with the Commision on June 3, 1920. These findings of fact are full and complete.

Among the material facts are: (a) That the Company was promoted and financed by individuals interested in the Texas Louisiana Lumber Company (Tr. p. 28); (b) The line was constructed primarily to serve the Lumber Company which then owned 116,000 acres of pine timber land near Kennard, and the Lumber Company constructed at Ratliff near the terminus of the line, one of the largest mills in the South, for the production of lumber and forest products (Tr. p. 28); (c) The Texas Legislature had refused to authorize a consolidation with the St.Louis Southwestern Railway Company of Texas unless the Eastern Texas Railroad Company would extend its line to Crockett; (d) That the mill ceased operation about 1917, and that all of its tram tracks,

buildings, machinery, etc., have been removed to locations not on the lines of the Eastern Texas Railroad Company (Tr. p. 28); (e) That after the mill ceased operation, the traffic was not sufficient to pay the operating expenses and maintain the line of railway (Tr. pp. 28-29); (f) The Eastern Texas Railroad Company lines connected at Lufkin with the St. Louis Southwestern Railway Company of Texas and other lines, and extended to Kennard where it had no railroad connection; (g) the situation of the territory served, after the line would be abandoned, is set forth (Tr. pp. 30-31); and upon the facts found the Commission concluded that the present public convenience and necessity permitted the abandonment of the line (Tr. p. 31).

Thereupon, the certificate of Public Convenience and Necessity issued, and it shows that paragraphs 18 to 21 inclusive of Section 1 of the Interstate Commerce Act had been complied with (Tr. pp. 31-32), and authorizes the abandoment of the operation of the railway owned by the Eastern Texas Railroad Company, and the taking up, dismantling and removal of any and all parts of its property (Tr. p. 32).

Exhibit "B" made a part of the Petition (Tr. p. 33) contains the Articles of Incorporation of the Eastern Texas Railroad Company.

The final order made in the court below sustained the motion of the United States and the motion of the Interstate Commerce Commission to dismiss the bill (Tr. pp. 50-51), from which order appellants, in open court, appealed, and the appeal was annulled (Tr. pp. 50-51).

This Court has heretofore ordered that this cause be sub-

mitted and argued with the case of State of Texas, appellant, vs. Eastern Texas Railroad Company, et al, Appellees, Number 298, October term 1921 (870); which latter case had been fully briefed prior to the making of the order for submission of the two causes together. We deem it unnecessary to encumber this brief with a repetition of the arguments contained in the brief in cause 298, and instead of doing so, cite that brief and rely upon the same as fully as if reproduced herein.

SOVEREIGNTY, STATE AND FEDERAL

Appellants in the case at bar base their cause of action upon the unconstitutionality of Paragraphs 18, 19, 20, 21 and 22 added to the First Section of the Act to Regulate Commerce, by the provisions of Section 402 of the Transportation Act. These paragraphs have been copied in full at pages 25-27 of our Brief in Cause No. 298, and are not repeated herein.

Digesting the contention of appellants, made in their petition, their assignments of error, and their brief in this cause, we find that their primary contention is that in the distribution of sovereign powers to regulate commerce between the State and the United States, power was not conferred upon the United States to authorize the abandonment of a line of railway which had been constructed under a charter granted by the State, and which line of railway was situated wholly within the State. The trial court by dismissing their petition decided this contention against them.

We submit that in order for this court to reverse the trial court on this point, it must hold, either:

1. That the sovereign power had not been delegated by the people in the Constitution to the Congress to legislate upon the subject; or

2. That the power exercised by Congress in the paragraphs of the Transportation Act referred to violates some provision of the Constitution of the United States.

The position of appellants is set forth in their brief, beginning at page 6. After some general discussion of the question bringing it down to the fact that a carrier which could not earn operating expenses would be a burden upon interstate commerce, appellants referring to said paragraphs say: "It was, therefore, provided that such carrier may be relieved, either upon their own application, or upon the Commission's initiative from engaging in interstate commerce. *** To this theory and thus far, we subscribe. We assert, however, that when Congress had withdrawn interstate commerce from such carriers by giving permission for their abandoment, the full purpose of the act has been accomplished, and no further action was authorized."

Then appellants discuss the provisions of the paragraphs referred to, and after giving their construction of these paragraghs, at page 10 state their conclusion as to the limitation that must be placed upon the action of Congress, as follows:

> "We submit in the light of the reasons given, and the language quoted that Congress did not intend by the Act, and that it does not exclude the authority of the State, but that the full purpose is served

when the language of the law has been complied with, when the Interstate Commerce Commission gives to the carrier its authority to abandon the operation of its line as an interstate carrier, leaving it then to be dealt with by the State creating its corporation, and to which it owes its existence, and with which it has a charter contract and obligation."

It will be observed from these quotations, and from the entire presentation of the question in appellants' brief, that they concede in this court that Congress has the power to legislate upon the subject of the abandonment of a line of railway, and has the authority to grant permission to abandon the use of a railroad in interstate commerce, but they contend that Congress has not the power to authorize the abandonment and dismantling of a line of railway.

We submit that the limitation upon the power of Congress, where its authority to legislate upon the subject is admitted, cannot be sustained. Te decisions of this court are uniformally against this contention. The rule as we understand it is:

The power conferred upon Congress by the Constitution over commerce among the states and with foreign nations is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitation save such as are prescribed in the Constitution, whenever such legislation bears, or in the exercise of fair legislative discretion can be deemed

to bear, upon the reliability or promptness or econmy or security or utility of interstate commerce.

The foregoing proposition is fully sustained by the decision of this court in the case of Mondou vs. N. Y. N. H. &. H. R. Co., 223 U. S. page 1, 56 L. ed. 327, in which case this court at page 746, L. ed. 344, announces the construction of Article 1, paragraph 8, clauses 3 and 18 of the Constitution, that are settled and no longer open to dispute. (See quotation from opinion of this court in Appellees' brief in cause 298, page 19 and 20).

See also McCullough vs. Maryland, 4 Wheaton 316, 4. L. ed. 579.

H. E. & W. T. Ry. et al vs. U. S. 234 U. S. 342, 58 L. ed. 1341,

We also make an extended quotation on this subject from the latter case in our brief in cause No. 298, beginning at page 21, and as part of our argument, we beg leave to extract from that quotation the following:

> "The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care."

These authorities show beyond question that the limitation upon the power of Congress suggested by Appellants cannot be sustained. We, therefore, proceed to the consideration of the question as to whether or not the para-

graphs of the Transportation Act referred to violate some other provision of the Constitution of the United States.

RIGHTS OF A STATE UNDER THE CONSTITUTION OF THE UNITED STATES.

Appellant, the State of Texas, being joined therein by its attorney general, brings this action as a sovereign state, and claims that the rights reserved to the state by the Constitution of the United States have been violated by the paragraphs of the Trasportation Act under consideration, in the following particulars:

1. Appellants ssert that the Eastern Texas Railroad Company was incorporated under and by virtue of the Constitution and laws of the State, whereby the Constitution and laws of the State became a part of the charter contract between the railway company and the state, and that said paragraphs of the Trasportation Act authorize the Railway Company to abandon the operation of its railway and take up its main track in violation of the provisions of said charter contract.

Now, we concede that in a sense the Constitution and laws of the State of Texas became a part of the charter contract between the railway company and the state, but we assert that the Constitution and laws of the United States became, in a sense, a part of such charter contract.

And when Congress, in the exercise of the power conferred upon it, proceeded to legislate upon the subject of the abandonment of railroads, and enacted the paragraphs referred to in the Transportation Act, then such paragraphs

superceded the provisions of the Constitution and laws of the State. This point is sustained by the opinion of this court in the case of Baltimore & Ohio Ry. Co. vs. I. C. C. 221, U. S. page 612, 55 L. ed. 878, in which case at page 618, L. ed. 882, this court in considering the argument that the Hours of Service Law passed by Congress did not apply to employees engaged in intrastate commerce, said:

> "But the argument, undoubtedly, involves the consideration that the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employes in such manner that the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively. And thus, many employes who have to do with the movement of trains in interstate transportation are, by virtue of practical necessity, also employed in intrastate transportation.
>
> "This consideration, however, lends no support to the contention that the statute is invalid. For there cannot be denied to Congress the effective exercise of its constitutional authority. By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce, and of those who are employed in transporting them."

This was a correct announcement of the authority of Congress as to employes who necessarily engaged in both interstate and intrastate commerce.

And we submit that the necessity for the interminglinng of intrastate commerce and interstate commerce by a carrier engaged in the transportation of both is greater than it is

with reference to the employes. Interstate commerce and intrastate commerce are frequently and commonly carried in the same car or in the same train and between the same points, and often for the same shipper, over the same line of railway. It would be impossible for Congress to properly exercise its power to regulate interstate commerce so as to determine when a line of railway should be extended or abandoned, without incidentally affecting intrastate commerce. We insist, therefore that the conclusions reached in the B. & O. case apply to the case at bar.

That case was referred to and approved by this court in the case of Houston East and West Texas Railway et al, vs. U. S., 234, 342, 58 L. ed. 1341, from which we have made an extended quotation in appellees' Brief at page 21 in cause No. 298, and we quote therefrom the following paragraph on page 233:

> "Whereever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the State, and not the Nation, would be supreme within the national field."

In the Transportation Act, Congress was legislating with reference to the "National field" of commerce, a domain into which the State cannot enter. The cases sustaining this proposition are too numerous to quote.

2. Appellants assert in their brief that:

"The lawful powers of a State may control the

physical properties of its private corporations and make rules and regulations therefor in accordance with the terms of its charter contract, with its amendments, and the laws of the State which enter into and become a part of such contract so long as such action does not become a direct burden on interstate commerce and so long as the exerting of power over its corporations does not prevent or embarrass exercise by Congress of any power with which it is vested by the Constitution." (Pages 11 and 12 Appellants' Brief).

Upon this right of the State, Appellants cite: B. & O. Ry. Co. vs. Maryland, 21 Wallace 456-473; Northern Securities Co. vs. U. S. 193 U. S. 197, 48 L. ed. 679.

It will be remembered that the latter case was an action brought by the United States against the Northern Securities Company, charging a violation of the Anti-Trust laws passed by Congress. It was alleged that a combination had been made of the stock of the two corporations by the purchase of such stock by the Securities Company, which Company was a state corporation. The argument was made that the State had authorized the Securities Company to acquire the stock, and that the enforcement of the Anti-trust Act passed by Congress against the Securities Company, whereby it would be prohibited from acquiring such stock would be an unauthorized interference by the national government with the internal commerce of the states. This court in disposing of that argument, at page 332, L. ed. 698, made the following announcement of the law:

"An act of Congress constitutionally passed un-

der its power to regulate commerce among the states and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a state court, is under the obligations of an oath so to regard a lawful enactment of Congress. Not even a state, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the government and its laws might be prostrated at the feet of local authority. Cohen vs. Virginia, 6 Wheat 264, 385, 414, 5 L. ed. 257, 286, 293. These views have been often expressed by this court."

Then this court in the same opinion, took up and considered a number of questions presented by the Appellant Securities Company, with reference to minor details, about the creation of corporations, the regulation of corporations and the control of the property of corporations by the State and under its authority. This court announced that no contention was made by the Appellee with reference to these matters, and then at page 335, L. ed. 699, said:

"But it (the United States) does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful, and not prohibited by the Constitution. It does contend that no state corporation can stand in the way of the enforcement of the national will, legally expressed."

After further discussing the question the court referred to the opinion of Chief Justice Marshall in the case of Gibbons vs. Ogden, 9 Wheaton page 196-197, 6 L. ed. 23-70,

and cited the same in support of the conclusion reached. The portions of the opinion in Gibbons vs. Ogden referred to, are quoted in Appellees' Brief in cause No. 298, pages 11-12 inclusive.

We, therefore, submit that the Northern Securities case is not authority for Appellants, but on the contrary decides the contention made by Appellants against them.

In the case of Smith vs. Alabama, 124 U. S. 465, 31 L. ed. 508, this Court had under consideration a case where an engineer who had operated an engine, pulling a passenger train upon the Mobile & Ohio Railway, used in transporting passengers in the County of Mobile and the State of Alabama, had been arrested for violating the law of Alabama providing that engineers should be examined for a license by a Board appointed by the Governor. Pending his arrest, the engineer applied for a writ of habeas corpus. The City Court, a municipality, refused to discharge the engineer, and the Supreme Court of the State of Alabama affirmed the judgment of the lower court. The case was then brought to this court. The facts showed that the engineer's run was from Mobile, Alabama, to Corinth, Mississippi, and that he had not stood the examination and procured the license required by the Statutes of Alabama. In passing upon the case, this court passed directly on the question of the power to regulate commerce reserved to the state, and in doing so, in the beginning of the opinion, at page 473, L. ed. 510, used the following language:

> "The grant of power to Congress in the Constitution to regulate commerce with foreign Nations

and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority. As the regulation of commerce may consist in abstaining from prescribing positive rules for its conduct, it cannot always be said that the power to regulate is dormant because not affirmatively exercised. And when it is manifest that Congress intends to leave that commerce, which is subject to its jurisdiction free and unfettered by any positive regulations, such intention would be contravened by state laws operating as regulations of commerce as much as though these had been expressly forbidden. In such cases, the existence of the power to regulate commerce in Congress has been construed to be not only paramount but exclusive, so as to withdraw the subject as the basis of legislation altogether from the States."

The Statement of the law contained in the forgoing quotation was approved in the case of Mondou vs. N. Y. N. H. & H. R. Co. 223 U. S. 426, 56 L. ed. 348. After making the quotation in the Mondou case, this court added:

"True, prior to the present act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because

> the subject is one which falls within the police power of the states in the absence of action by Congress. * * And now that Congress has acted, the laws of the states, in so far as they cover the same field are superseded, for necessarily that which is not supreme must yield to that which is."

Supporting which a large number of authorities are cited.

The two last cases cited, and the authorities referred to in those cases, show conclusively that although there was reserved to the states, and the police powers of the States, the right to prohibit a Railway Company from abandoning its main line of railway, and the State acting on this reserve power, had done this, still, when Congress acted within its constitutional power and authorized the abandonment, then the laws of the state were annulled.

AUTHORIZING THE ABANDONMENT OF A RAILWAY LINE IS A LEGISLATIVE ACT.

Under our form of government the distribution of the exercise of sovereign powers is fixed by constitutional provisions, both state and federal.

Under this distribution of powers, the Congress is authorized to create corporations.

McCullough vs. Maryland, 4 Wheaton, 316; 4 L. ed. 579.

Under the provisions of the Constitution and laws set forth in Appellants' petition, and relied upon in their brief, the Legislature of the State of Texas is authorized to create

and regulate private corporations, including railroad corporations, and has power to authorize the abandonment of lines of railway by a railway corporation.

The Thirty-Sixth Legislature of the State of Texas convened January 12, 1919 and passed the following Act:

"S. B. No. 293, Chapter 56.

An act to permit Texas Southwestern Railroad Company to take up and remove that portion of its railroad lying between Vair and Neff, and to sell and dispose of that part of its Right-of-way included between said two stations and to abandon the same and declaring an emergency.

Be it enacted by the Legislature of the State of

Texas:

Section 1. That permission is hereby granted Texas Southeastern Railroad Company, its successors and assigns, to take up and remove that portion of its line of railroad, including all rails, ties, angle bars, track fastenings, switches, sidings, signs, turnouts, wyes, depots and all other material and equipment belonging to said Company, including the line of railroad from the station of Vair, where the said Texas Southeastern Railroad Company connects with the line of road of the Groveton, Lufkin and Northern Rilway Company to the Northern Terminus of said line at Neff, a distance of approximately 7.7 miles, and to sell or dispose of all said material, including that portion of said Company's lands, in such manner as it may see fit, and to abandon all of that portion of its track and line of railroad. Provided, however, that the authority herein granted shall be subject to any and all valid liens existing upon or against said property and subordinate to the right of all holders of such liens, if any.

Section 2. The fact that said Texas Southeastern Railroad Company has never been able to pay its operating expenses upon that portion of said line, and the fact that a line of railroad between Vair and Neff is not required to serve the public interest, and the further fact that its track and equipment is rapidly deteriorating and will soon become a total loss to its owners, creates an emergency and an imperative public necessity which requires that the constitutional rule providing that bills be read on three several days be suspended, and this act shall take effect and be in force from and after its passage, and said rule is hereby suspended, and this act shall take effect and be in force from and after its passage, and said rule is hereby suspended, and it is so enacted.

Approved March 13, 1919.

General Laws of Texas, 36th Legislature, page 96"

At the same session a similiar Act was passed authorizing the Artesian Belt Railroad to take up its track (page 115). Also an Act authorizing the Texas Arkansas & Louisiana Railway to take up its tracks (Page 130). And at the same session The Riveria Beach & Western Railway were authorized to take up its tracks (page 39-40). These three last named Acts are in substance the same as the one quoted, and in each of them the Legislature finds practically the same facts as are found by the Interstate Commerce Commission in granting the certificate of Public Convenience and Necessity to the Eastern Texas Railroad Company.

It will be admitted that the Congress with reference to any railroad corporation created by it, could exercise the same power and authorize the abandonment of the

property of such corporation in the same manner as the Legislature of the State of Texas. It will also be admitted that Congress with reference to such corporation could have exercised such power in the manner prescribed in Paragraphs 18, 19, 20 and 21 of Section 402 of the Transportation Act.

Appellants contend, however, that Congress could not exercise such power with reference to a railway corporation created by the State of Texas without the permission of the State being procured by the railway company. There might be some plausibility in this contention if it were not for the facts stated in Appellant's petition, wherein they rely upon Articles 6608-6617 of the Revised Statutes of Texas, the first of which was formerly Article 4535 (Tr. p. 15).

By the provisions of this latter article railway corporations created by the State were required to engage in interstate commerce. It cannot be questioned, it seems to us, that where the State requires a railway corporation created by the State to engage in interstate commerce, and it does so engage, that then its lines of railway become an instrument of interstate commerce subject to be regulated by Congress. This is manifest by the provisions of the Act to Regulate Commerce, which Act applies to carriers engaged in interstate and foreign commerce; and which Act by virtue of the amendment of the first section thereof, contained in Sections 402 of the Transportation Act, whereby Paragraphs 18, 19, 20 and 21 were added to said Section 1, now authorizes the abandonment of a line of railway in the

manner and form provided in said paragraphs. These paragraphs apply to a railway company and its lines of railway regardless of whether or not the Railway Company was created by the State or by the United States. The power by Congress is not affected by the question as to what government created the corporation; but depends upon the fact that the Railway Company is engaged in interstate and foreign commerce.

However, the record in this cause presents a conflict between the regulations prescribed by the state and the regulations prescribed by Congress.

It is alleged in Appellant's petititon that the State had prohibited the abandonment and dismantling of a main line of railway, and we admit the correctness of this allegation. On the other hand, the Congress, by the provisions of paragraphs 18, 19, 20 and 21 of Section 402 of the Transportation Act, authorized the abandonment of a line of railway by a carrier that had procured a certificate of public convenience and necessity from the Interstate Commerce Commission.

We submit that under the Constitution of the United States, and laws passed in pursuance thereof, and the authorities cited in this brief and in our brief in case number 298, the regulations prescribed by the state must yield to the regulations prescribed by Congress.

Appellants admit that Congress could authorize the Eastern Texas Railroad Company to abandon the use of its property in the transportation of interstate and foreign commerce, but deny the power of Congress to authorize the

abandonment by said railway of such property in the transportation of intrastate commerce.

And appellants claim that said provisions of the Transportation Act should be so construed by this court. They base this contention largely on the words: "From and after the issuance of said Certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate, and proceed with the construction, operation or abandonment covered thereby", contained in paragraph 20 of Section 402, asserting that these words simply mean that no other federal approval should be required. In support of this contention they quote other provisions of the Transportation Act.

On the other hand, we submit that the language of the Transportation Act will not support the contention made by Appellants. Immediately following the language quoted is a provision making it unlawful for a carrier either to extend, or abandon its lines in violation of the provisions contained in these paragraphs, which provisions subject not only the carrier but each of its officers and agents acting for or employed by such carrier to a fine of not more than \$5000.00 or imprisonment for not more than three years, or both.

This penalty enactment is followed by paragraph 21, which required the furnishing of adequate facilities in the way of car service, and makes it a penalty to disobey such requirements.

Then making the matter more definite, Section 22 is

added, wherein it is provided "That the authority of the Commission conferred by paragraphs 18 to 21, both inclusive, shall not extend to the construction or abandonment of spur, industrial, switching or sidetracks located or to be located wholly within one state, or of street, interurban or interurban electric railways, which are not operated as a part, or parts, of a general steam railroad system of transportation."

This section 22 makes it clear that Congress was legislating fully, completely and finally with reference to general steam railroad systems of transportation, but that Congress did not intend such regulations to extend to such minor details as sidetracks, street railways, etc.

ACT TO REGULATE COMMERCE.

Going beyond the construction of paragraphs 18, 19, 20 and 21 of Section 1 of the Act to Regulate Commerce, as amended by the Transportation Act, and looking to the entire system of regulation as now prescribed by Congress, it is, as we conclude, entirely clear that Congress intended to authorize the abandonment of a railway without the consent of the State being obtained.

The Act to Regulate Commerce, as originally passed in 1887, was limited in its scope. From time to time Congress has adopted amendments extending the scope of this Act. The authority of the Interstate Commerce Commission, for instance, over rates, was very limited in the original Act. This authority has now been extended until the interstate Commerce Commission is in effect a rate-making body. The authority of the Commission in many other respects has been extended.

In an Act supplemental to the Act to Regulate Commerce, the Congress required the abandonment of the use of the link and pin coupling of cars, and other appliances used on cars, and the substitution therefor of automatic couplers and other appliances prescribed. Congress authorized the Commission, after proper investigation, to designate the appliances that should be used on cars. These appliances, by the provisions of the Safety Appliance Act, and by the construction placed upon those acts by this Court, are required to be installed on cars and engines which are used in transporting both state and interstate commerce.

By the provisions of these Safety Appliance Acts, the carriers by railroad were required to abandon and destroy a large amount of property then in use, and substitute, at their own expense, new and different appliances. If Congress could **require** by its regulations the abandonment of the use of appliances, and the substitution of different appliances, then we submit that Congress can **permit** the abandonment of any instrumentality where used in both state and interstate commerce, upon the application of the carrier, where the public convenience and necessity does not require the continued use thereof.

By various decisions of this Court, the Act to Regulate Commerce, together with the amendments thereof, and the Acts supplemental thereto, had been recognized as a general system of regulation of interstate commerce prior to the passage of the Transportation Act. At the time of the passage of that Act Congress was confronted with the duty and responsibility of returning the transportation sys-

tems of the country to the owners thereof; and also with the necessity of the country for an adequate transportation system. In order to determine what additional regulations were necessary, the Congress went into an exhaustive investigation of the entire subject; after such investigation the Transportation Act of 1920 was prepared and passed. This Act included many new regulations. The ones which are important to be kept in mind in considering the questions involved in the case at bar are:

The broadening of the authority of the Commission over rate-making; the granting to the Commission of the authority to supervise the capitalization of railway companies and systems; the provisions authorizing a carrier by railroad to apply for loans from the United States, and conferring upon the Commission the authority to investigate such applications, and certify their conclusions to the Secretary of the Treasury of the United States; and the granting to the Secretary of the Treasury upon receipt of such certificate, authority to make loans, and prescribe the form of the obligation securing the same, and the creation of certain Labor Boards to investigate controversies as to wages and working conditions.

There was also included the regulation of the extension or abandonment of a line of railway. In this regulation the extension of a line of railway was prohibited until the carrier applied to the Interstate Commerce Commission and procured from it a certificate that the extension was **required** by the public convenience and necessity. In the case of the abandonment of a line of railway, or any part

thereof, the abandonment was prohibited until the carrier applied to, and secured from the Commission, a certificate that the public convenience and necessity **permitted** such abandonment.

Each and all of these provisions show in their manner and form, that Congress intended the regulation to be the exercise of a sovereign power over the subject involved. However, it was made plain that the Commission, and other officers of the United States, were expected to co-operate with the carriers, and the states, to effect the purposes of Congress.

Keeping in mind this view of the Transportation Act, we submit that the words "without other approval" used in paragraph 20, added to Section 1 of the Act to Regulate Commerce, were intended by Congress to mean **without the approval of any other authority, state or federal.** Any other construction of these words, or any limitation of them to federal approval, is entirely contrary to the spirit of the Transportation Act. We must assume that Congress knew of the provisions in the laws of the various states with reference to the extension and abandonment of a line of railway, and that Congress intended to substitute for all of such provisions, the enactment contained in pragraphs 18, 19, 20 and 21 of Section 402 of that Act.

We must also assume that the provisions contained in these paragraphs were prepared with reference to and with the utmost consideration of the decisions of this court, for it is manifest from the wording of the paragraphs, that such

provisions conform to the principles announced in the decisions of this court.

On the question of investigations made by Congress, either in the passage of an Act, or provisions made for such investigations before an Act should become effective, we refer to the case of Simpson vs. Shepard (Minnesota Rate Case) 230 U. S. 352, 57 L. ed. 1511. After an exhaustive reveiw of the entire question of the power of Congress and of the states, this court at page 432, L. ed. 1555, said:

> "But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its intruments the measure of the regulation it should supply. It is the function of this Court to interpret and apply the law already enac-, ted, but not, under the guise of construction, to provide a more comprehensive scheme of regulation than Congress has decided upon."

This court then proceeded in said case to show the very great difficulty there was in apportioning the value of the property used in intrastate commerce and the value used in interstate commerce, so as to determine whether the

intrastate rates were reasonable and just or not. The analysis of the situation showed that the difficulties were almost insurmountable. At page 465, L. ed. 1568, this court said with reference thereto:

> The wide range of the estimates of extra cost, from three to six or seven times that of the interstate business per ton mile, shows both the difficulty and the lack of certainty in passing judgment.
>
> We are of opinion that, on an issue of this character, involving the constitutional validity of state action, general estimates of the sort here submitted, with respect to a subject so intricate and important, should not be accepted as adequate proof to sustain a finding of confiscation."

As stated Congress was familiar with the decisions referred to and the difficulties pointed out. So when it came to formulate an Act with reference to the extension or abandonment of a railroad, it authorized both. Then it provided a method whereby the facts as to public convenience and necessity could be ascertained. When this had been done and certified by the Interstate Commerce Commission, then Congress declared that such extension or abandonment could be proceeded with without securing other approval than such certificate, the purpose being to eliminate all question of public convenience and necessity, either as to interstate traffic or intrastate traffic.

This was a new regulaion by Congress, and was complete in itself.

In the foregoing, we have referred to the Minnesota

rate case, but many other cases have pointed out similar difficulties, and we assume that those cases were thoroughly understood by the Congress.

THE PETITION AND BILL OF COMPLAINT OF APPELLANTS IS WITHOUT EQUITY.

It must be kept in mind that under the established law of the State of Texas, the State, when it comes into court as a litigant, thereby accepts the same position as an individual or corporation when either of those parties institute proceedings in court.

Announcing the law on this subject, the Supreme Court of the State in the case of Fristoe vs. Leon & H. Blum, 92 Texas Reps. at page 80, said:

> "A clear understanding of the relation in which the state stands to the purchasers in these contracts will greatly facilitate a proper solution of the questions upon which this case depends. It is well settled that so long as the State is engaged in making or enforcing laws or in the discharge of any governmental function it is to be regarded as a sovereign and has preogatives which do not appertain to the individual citizen, but when it becomes a suitor in its own courts or a party to a contract with a citizen the same law applies to it as under like conditions governs the contracts of an individual."

Appellants do not claim, either in their petition and Bill of Complaint, or their assignments of error, or their brief, that the State would sustain any pecuniary loss or damage by the abandonment of the line of railway of the Eastern

Texas Railroad Company. Measuring the state's rights as a litigant by those of a citizen, the petition does not for this reason state any cause of action. The political rights of the State in the sense in which they are presented in the Petition and Bill of Complaint, do not constitute a cause of action cognizable in court.

Whether a question is cognizable by the Legislative branch or the Judicial branch of the government is the same with reference to the state or the United States.

In considering questions of this nature, this court, in the case of Simpson vs. Shepard (Minnesota rate case) 230 U. S. 352, 57 L. ed. 1511, heretofore cited, at page 399, L. ed. 1541, said:

> "This reservation to the States manifestly is only of that authority which is consistent with, and not opposed to, the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the comingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from

the supremacy of the national power within its appointed sphere."

The exercise of the power conferred upon Congress by the Constitution could not result in giving the state a cause of action which can be maintained in court.

Cooley's Constitutional Limitation, 7th. Edition Chapter 4, pages 71-74.

In the case of People vs. Barrett, 203, Ill. 99, 67 N. E. 742, 96 American State Reports 296, the Supreme Court of Illinois had before it a question of contempt for violating an injunction issued, enjoining an election Board from producing and counting ballots in a contested election case. In passing upon the case, the court announced the law to be:

> "It is elementary that the subject matter of all chancery jurisdiction is property and the maintenance of civil rights, and that matters of a political hcaracter do not come within its jurisdiction."

The cases of State of Georgia vs. Edward M. Stanton, U. S. Grant and Jno. Polk, and the State of Miss. vs. Stanton U. S. Grant and E. O. Cord, 6 Wallace. 50, 18 L.ed. 721 were cases in which the States filed an original suit in this court against the Secretary of War, et al., for the purpose of restraining the defendants from carrying into execution the provisions of an "Act to provide for the more efficient government of the rebel states." A motion was made to dismiss the Bill for want of jurisdiction of the subject matter set forth in the Bill, the motion alleging that the matters

set up were political and not judicial, and therefore, not of judicial cognizance. In summarizing the Bill this court said at page 76:

> "It will be seen that we are called upon to restrain the defendant, who represents the executive authority of the government in carrying into execution certain acts of Congress, in as much as such execution would annul and totally abolish the existing state government of Georgia"

Upon the allegation made, this court held the cause of action attempted to be set up was political, and dismissed the Bill.

See also Fletcher vs. Tuttle, 161 Ill. 41, 42 Am. St. Rep. 220.

In the case at bar the State of Texas as a sovereign state is complaining of the United States, another sovereign, for infringing upon the sovereign rights of the State of Texas, and does not show that the property rights of the State of Texas were injured thereby.

CHARACTER OF ORDER MADE BY THE COMMISSION

Appellant's claim that the order made by the Interstate Commerce Commission on the abandonment herein involved was a negative order. We conclude this contention cannot be sustained. The paragraphs of the Transportation Act involved contain a grant of a right made by Congress to a Railway Company to abandon its line of railway, but before this grant attaches the Congress required that any railroad desiring to procure the benefits of such grant, must

apply to the Interstate Commerce Commission and secure a Certificate of Public Convenience and Necessity from the Commission, after which the right granted could be exercised. The action of the Commission is an affirmative action. It establishes the existence of the fact that the public convenience and necessity permitted the abandonment of the railroad, and is in no sense negative.

U. S. vs. A. T. & S. F. Ry. 234, U. S. 476, 58 L. ed. 1408

U. S. vs. Louisiana R. R. Com. 234 U. S. page 1, 58 L. ed. 1185.

FINDINGS OF FACT BY THE COMMISSION ARE CONCLUSIVE.

On this point we cite Mfgrs. Ry. vs. U. S. 246 U. S. 851, 62 L. ed. 847, holding that all parties should submit their evidence to the Commission, and that so long as the Commission proceeds in accordance with the requirements of the Commerce Act, and its amendments, with proper regard for constitutional restrictions, such orders are not subject to revision by the courts.

We also cite

T. & P. Ry. vs. Abilene Oil Co. 204 U. S. 226, 51 L. ed.553;
Loomis vs. Lehigh Valley Ry. 240 U. S. 43, 60 L. ed. 517
U. S. vs. L. & N. Ry. 235 U. S. 314.

THE EASTERN TEXAS RAILROAD COMPANY HAD A RIGHT TO ABANDON ITS LINE WHEN THE REVENUES DERIVED FROM THE OPERATION WOULD NOT PAY OPERATING EXPENSES.

We submit that when the Railway Company secured its charter, it became obligated to furnish adequate service at reasonable rates, but on the other hand there was an obligation on the part of the public to furnish sufficient transportation to pay operating expenses, and a reasonable return on the value of the property. When this was not done, the Railway Company was entitled to abandon its service.

Upon this question we cite:

Brooks-Scanlon Co. vs. R.R. Commission of La. U. S. Supreme Court, Advance Opinions, 1919-1920, Nos. 8 and 9, March 1 and 15, page 212.

Jack vs. Williams 113 Federal; which was affirmed on appeal to the Circuit Court, 145 Federal 281.

Central Bank & Trust Co. vs. Cleveland 252 Federal 530.

State of Iowa vs. Old Colony Trust Co. 215 Federal 307.

These authorities justified the Interstate Commerce Commission, to whom they were presented, in authorizing the abandonment of the Eastern Texas Railroad.

The findings of fact made by the Commission were very full on this subject, and on the effect of these findings

and the right of the trial court to dismiss the bill, we cite: Cincinnati, Hamilton & Dayton R. R. Co. vs. I. C. C., 306 U. S. 142, 51 L. ed. 1000, in which cause, at page 154, this court says:

> "The Statute gives prima facia effect to the findings of the Commission, and, when those findings are concurred in by the Circuit Court, we think they should not be interfered with unless the record establishes that clear and unmistakable error has been committed."

See also I. C. Ry. Co. vs. I. C. C. 206 U. S. 441; 51 L. Ed. 1128.

In the case of I. C. C. vs. Union Pacific Ry. 222 U. S. 541; 56 L. Ed. 308, Mr. Justice Lamar speaking for this court, at page 447, L. Ed. 311, said:

> "There has been no attempt to make en exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or, (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or, (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow,

determines the validity of the exercise of the power. Interstate Commerce Commission vs. Illinois C. R. Co. 215 U. S. 470, 54 L. ed. 287, 30 Sup. Ct. Rep. 155, Southern P. Co. vs. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283 Sup. Rep. 288 Interstate Commerce Commission vs. Northern P. R. Co. 216 U. S. 544, 54 L. ed. 609, 30 Sup. Ct. Rep. 417; Interstate Commerce Commission vs. Alabama Midland R. Co. 168 U. S. 146, 174, 42 L. ed. 414, 425, 18 Sup. Ct. Rep. 45.

In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. "The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience". Illinois C. R. Co. vs. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700. Its conclusion, of course, is subject to review, but when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

Upon this brief and authorities cited, these Appellees submit this cause.

E. B. PERKINS,
DANIEL UPTHEGROVE,
E. J. MANTOOTH,

Solicitors for Appellees, St. Louis Southwestern Railway Company; St. Louis Southwestern Railway Company of Texas; and Eastern Texas Railroad Company.

In Equity No. 563.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE STATE OF TEXAS ET AL., APPELLANTS,
v.
THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

WALTER McFARLAND,
For Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

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SUBJECT INDEX.

TABLE OF CASES CITED.

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BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

On June 3, 1920, the Eastern Texas Railroad Company made application to the Interstate Commerce Commission, hereinafter termed the Commission, for a certificate of public convenience and necessity to abandon all of its lines of railway between Lufkin, Tex., and Kennard, Tex., pursuant to the provisions of paragraphs (18) to (21), inclusive, of section 1 of the interstate commerce act (Rec. 31). The paragraphs mentioned, together with a companion paragraph designated (22), were added to section 1 of the interstate commerce act by section 402 of the transportation act, 1920, approved, February 28, 1920, 41 Stat., 456, 477. For the convenience of the court they are reproduced as an appendix hereto.

Upon receipt of the application, which was docketed as Finance Docket No. 4, the Commission instituted a proceeding of investigation into the matters presented by the application and caused notice of the application to be given to and copy to be filed with the governor of the State of Texas, and caused said notice to be published for three consecutive weeks in a newspaper of general circulation in each county in or through which said line of railroad is constructed and operated (Rec. 31). A hearing was held before an examiner for the Commission at which a large volume of evidence, both oral and documentary, was introduced. The oral testimony was reduced to writing by the reporter for the Commission and a copy thereof bound with the documentary evidence in the record. Subsequently briefs were filed by interested parties, the case was argued before the Commission, and was duly submitted for decision. On December 2, 1920, the Commission made its report (Rec. 27) and certificate of convenience and necessity (Rec. 31) in Finance Docket No. 4, which are here under attack. The report and certificate are substantially as set forth in Exhibit A of the bill of complaint. The certificate authorized the Eastern Texas Railroad Company to abandon its line of railway between Lufkin and Kennard. For a full statement of the Commission's findings, the court is respectfully referred to said report and certificate of the Commission. The report, which is by refer-

ence made a part of the certificate, is in part as follows:

> Applicant's line was constructed primarily to serve the lumber company which then owned 116,000 acres of pine-timberland near Kennard, and had constructed at Ratcliff what is said to have been one of the largest mills in the south for the production of lumber and forest products. Applicant built numerous tramroads through this timber to connect with its main line. On August 28, 1906, it sold these tram tracks, its current assets and rolling stock, aggregating in book value $94,604.49, to the lumber company. This sale was made in contemplation of the transfer of the Eastern-Texas stock to the Southwestern for bonds of that company stated to have been worth the par value of the stock and the fair value of the Eastern Texas as determined by the Railroad Commission of Texas.
>
> The Ratcliff mill ceased operation about 1917, and its tram tracks, machinery and practically all of its buildings have since been moved to locations not on applicant's line.
>
> Applicant contends that since the removal of the mill there is not, and within any reasonable time will not be, enough traffic offered to produce revenue sufficient to pay its operating expenses. It shows that the country it serves is largely cut-over timberland, the soil poor, and the agricultural development very limited except in the vicinity of Ratcliff and Kennard. It points out that the area is sparsely settled, particularly between those two towns where

it is estimated that some 600 people live; and that there are no other towns or villages along the line. Ratcliff is said to have a population of 900 and that of Kennard is estimated at 1,200. The timber from some 20,000 acres of land, along applicant's line, owned by the Southern Pine Lumber Company is transported either by the Texas Southeastern Railroad or the Groveton, Lufkin & Northern Railway. Three small mills, installed after the abandonment of the Ratcliff mill on account of the then abnormally high prices of lumber and forest products, ceased operating with the decline in the lumber market and were closed at the time of the hearing. The lumber company now owns about 84,000 acres of land surrounding Ratcliff and Kennard on some of which the second growth of timber is said to be of marketable size, but it is not yet in condition to be profitably cut.

About 70 per cent of the traffic handled by the Eastern Texas in 1919 consisted of forest products. Agricultural products totaled less than 10 per cent, and the remaining 20 per cent was made up of mine products, animals, manufactured products, merchandise and other commodities. During each year of the 4 years immediately preceding June 30, 1913, mine products, consisting chiefly of bituminous coal used at the Ratcliff mill, exceeded the products of agriculture and animals combined; but the coal tonnage decreased from 6,886 tons in 1913 to 36 tons in 1918, and no coal moved in 1919, nor during the first 5 months of 1920. The greatest volume of

agricultural products moved since 1909 was the 6,592 tons carried in 1914. This traffic had decreased to 2,072 tons in 1919, and 1,038 tons was moved in the first 5 months of 1920. The tonnage of forest products from 1909, to 1917, ranged from 41,312 tons in 1915 to 66,936 tons in 1917. Only 25,738 tons of this traffic moved in 1918, 14,966 tons in 1919, and 9,958 tons in the first 5 months of 1920. The total of all commodities moved has decreased from 78,177 tons in 1913, to 21,352 tons in 1919, and 12,969 tons in the first 5 months of 1920. Exhibits offered showed a detailed statement of the freight tonnage handled by applicant from 1909 to 1920.

The income of the Eastern Texas shows a corresponding shrinkage since 1912 except for the year 1917. Applicant's gross income for the year ended June 30, 1920, was $34,210 and its net income $24,494.21. The corresponding figures for 1917 were $17,336.95 and $6,391.57. Its operating expenses exceeded its operating revenues by $9,699.66 in 1918, by $4,086.15 in 1919, and by $24,207.10 in the first 5 months of 1920. The total deficit incurred in 1918 was $20,128.46, in 1919 it was $49,362.64 and in January and February of 1920 it was $10,484.27. The Eastern Texas was under Federal control during 1918, 1919, and the first 2 months of 1920, and its net corporate income was $2,942.36 in 1918 and $5,041.74 in 1919. There was a deficit of $2,033.19 for March, 1920, $4,455.54 for April, 1920, $11,703.96 for May, 1920, and applicant estimated its total deficit for the year would be

$68,824.68, exclusive of large expenditures necessary for maintenance of way to place the road in safe operating condition. Applicant's general balance sheet shows a credit balance of $32,393.68 on May 1, 1920.

Applicant states it will furnish bond in the sum of $100,000 for the cancellation of all of its outstanding obligations, and that the Southwestern will guarantee said bond and advance to applicant sufficient funds to pay or secure the payment of wages, accrued taxes, claims, loans, bills payable and all other lawful obligations outstanding at the date of abandonment, if abandonment is authorized, whether the indebtedness or obligation is or is not audited and reflected in applicant's account, and whether the claim has been or may later be presented.

Rates to and from Lufkin apply to and from Ratcliff and Kennard on interstate traffic, which comprises approximately 75 per cent of applicant's total tonnage. The divisions between the Eastern Texas and the Cotton Belt are said to be on a more liberal basis than is ordinarily allowed individual short line connections, and applicant contends that it would be impossible to increase its rates or divisions in an amount sufficient to make its revenues meet its operating expenses. Its operating ratio was 440 per cent under the rates in effect immediately prior to the increases authorized in *Increased Rates, 1920*, 58 I. C. C., 220.

The Eastern Texas was originally well laid out from an engineering standpoint, the roadbed

being generally level and the grades and curves short. The maximum gradient is slightly more than 1 per cent and the sharpest curve is about 4 degrees. The line was laid with 35-pound steel rails which are not badly worn but are both line and surface bent to such an extent that it is said trains can not safely be operated over them at a speed exceeding 12 or 15 miles an hour. Many streams run at right angles across the railroad's right of way and, in addition to numerous cuts and fills, there are 50 bridges and trestles with a combined length of 8,862 feet, which range in height from 5 to 25 feet. The roadbed, trestles and bridges have not been well maintained, but the ties are in fair condition. Six bridges and trestles, with a combined length of 2,282 feet, are in need of immediate renewal to insure safe operation and all of the others require heavy repairs. Embankments and fills have fallen away, particularly at bridge and trestle approaches, to such an extent that the ties are not properly supported. The slopes of cuts and ditches have fallen in, damaging the draining so that, in many places, ties are covered with dirt. Applicant estimates that if operation is continued it will be necessary within the next two years to expend $146,000 to $200,000 on roadways, bridges and trestles, due largely to deferred maintenance attendant on the operation of the line at a loss.

* * * Objectors testified as to the general conditions of the territory and the prospects for further increases in tonnage, but

> made no definite showing that within a reasonable time, there would be sufficient tonnage to pay the operating expenses of the road. To meet their objections, applicant has offered to sell its line to any local interests for $50,000.
>
> Upon consideration of the record we find that the present public convenience and necessity permit the abandonment of applicant's line, and we further find that permission to abandon the line should be made subject to the right of persons interested in the community served to purchase the property at a figure not in excess of $50,000. A certificate and order to that effect will be issued.

In the bill of complaint (Rec. 1) it was alleged in substance that paragraphs (18) to (22), inclusive, of the interstate commerce act are unconstitutional (Rec. 17, 19 and 20) for the reason that Congress exceeded its power to regulate interstate and foreign commerce and invaded the rights of the State of Texas to regulate corporations chartered by it; and that the order of the Commission was invalid because beyond its statutory powers, unconstitutional and not supported by evidence (Rec. 22). The appellants prayed in substance that an interlocutory injunction be granted against the appellees during the pendency of the suit; that the Commission's report, findings and order be set aside; that paragraphs (18) to (22), inclusive, of section 1 of the interstate commerce act be declared unconstitutional; that writs of mandamus and prohibition be

issued; and that a permanent injunction be granted against action under the Commission's report and order (Rec. 25, 26).

The United States filed a motion to dismiss the petition and bill of complaint (Rec. 44). The Commission filed a motion to dismiss the bill as to it (Rec. 46); and, without waiving its objection to the sufficiency of the bill of complaint, also filed its answer (Rec. 47).

In the Commission's motion it was alleged—

> 1. That it affirmatively appears in the petition and bill of complaint, hereinafter termed the bill of complaint, that the certificate of convenience and necessity, set out in Exhibit A thereof, made by the Commission on December 2, 1920, is not an order of the Commission within the meaning of section 1 of an act approved June 18, 1910, 36 Stat., 539, and of the subdivision headed "Judicial" of an act approved October 22, 1913, 38 Stat., 208, 219, under which plaintiffs seek to maintain this suit.
>
> 2. That the said bill of complaint does not state a cause of action entitling the plaintiff to the relief, or any part thereof, prayed for in said bill of complaint.

Upon hearing the District Court made its final order (Rec. 50), the pertinent portions of which are as follows:

> 1. That the motion filed by the United States to dismiss the petition and bill of

complaint be and the same is hereby sustained, and that the petition and bill of complaint be and the same is hereby dismissed, to which ruling of the court the plaintiffs, by their counsel, then and there in open court, objected and excepted.

2. That the motion filed by the Interstate Commerce Commission to dismiss the petition and bill of complaint be and the same is hereby sustained, and that the petition and bill of complaint be and the same is hereby dismissed, to which ruling of the court the plaintiffs, by their counsel, then and there, in open court, objected and excepted.

3. And thereupon, in open court, the plaintiffs, by their counsel, prayed an appeal to the Supreme Court of the United States from the foregoing final order, which appeal was in open court allowed as prayed.

The complainants below appealed from this order, alleging (Rec. 51) that there was manifest error in—

1. Holding that there was no equity in the bill of complaint.

2. Dismissing the bill as to the carriers upon the motion of the United States and the Commission.

3. Dismissing the bill and thereby denying appellants the right to attack the order of the Commission in the manner prescribed by law.

ARGUMENT.

I. The certificate of convenience and necessity, made by the Commission on December 2, 1920, is not an order within the meaning of the statutes conferring upon the district courts jurisdiction of "Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

We are not familiar with any case in which this precise question has been determined by any court. It must be decided from an examination of paragraphs (18) to (22), inclusive, of section 1 of the interstate commerce act, and of decisions construing the statutes under which this action is sought to be maintained. The statutes in question are section 1 of an act approved June 18, 1910, 36 Stat., 539, and the subdivision headed "Judicial" of an act approved October 22, 1913, 38 Stat., 208, 219.

It will be seen from reading said paragraphs (18) to (22) that Congress, among other things, laid down certain rules of conduct in paragraph (18) regarding the abandonment of all or any portion of a line of railroad, or the operation thereof, by a carrier subject to the interstate commerce act; prescribed in paragraph (19) the procedure to be followed in giving a full hearing; and in paragraph (20) provided that the Commission should have power to issue the certificate, either as prayed for, or in part, or with conditions attached, or to refuse to issue such certificate.

Paragraph (21) provides that, under certain circumstances, the Commission may "authorize or

require by order any carrier by railroad subject to this Act, party to such proceeding, * * * to extend its line or lines." The attention of the court is invited to the distinction which Congress has observed between the certificate of convenience and necessity, which is essentially permissive even though some conditions may be attached which will require affirmative action in case the permission is accepted, and the order requiring affirmative action which is provided for in paragraph (21). It seems clear that in issuing or refusing to issue a certificate of convenience and necessity the Commission merely exercises its discretion in a matter confided to its jurisdiction and that the courts will not interfere to control that discretion, by requiring the Commission either to issue or to refuse to issue such certificate.

In *Procter & Gamble* v. *United States*, 225 U. S., 282, the court had before it an attempt to have set aside an order of the Commission dismissing a complaint. The Supreme Court held that the Commerce Court was given jurisdiction only to entertain complaints as to affirmative orders of the Commission. This is the jurisdiction which, on October 22, 1913, was transferred to the district courts.

In *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S., 412, the Supreme Court had before it an appeal from a decree of a District Court, three judges sitting, dismissing a bill to prevent the enforcement of an order of the Commission. The Commission's order dismissed a petition of the appellant under the Panama Canal act, 37 Stat., 560, 566, for an extension

of the time during which it might continue to operate its boat line. The Supreme Court held that the order was negative in substance and form, and that there was nothing for a court of equity to enjoin.

In *United States* v. *Illinois Cent. R. R. Co.*, 244 U. S., 82, this court held that an order of the Commission assigning a case for hearing is not an order which a District Court has jurisdiction to enjoin under 36 Stat., 539, Judicial Code, section 207, saying:

> The notice, therefore, had no characteristic of an order, affirmative or negative. It was a mere incident in the proceeding, the accident of the occasion—in effect, and it may be contended, in form, but a continuance of the hearing. The fact that the continuance was to another day and place did not change its substance or give it the character described in *Procter & Gamble Co.* v. *United States*, one which constrained the railroad company to obedience unless it was annulled or suspended by judicial decree.

The District Court, in making its order sustaining the motion of the Commission that as to it the bill of complaint should be dismissed, did not render an opinion or specify whether its action was based upon the ground that the certificate of convenience and necessity was not an order within the meaning of the statutes, or upon the ground that the bill did not state a good cause of action, or both. It is manifest that if either ground is sound the order must be sustained.

The Commission has taken the position indicated in this subdivision of the argument, not with any wish to defeat review by the courts of its certificates of convenience and necessity on the grounds outlined by this Court in the *Procter & Gamble case*, *supra*, and other decisions, if such certificates are orders within the meaning of the statutes, but to present the matter in such a manner that a ruling can be secured on a doubtful question in the first case in court affecting such certificates.

II. The Commission acted in conformity with the authority conferred upon it by the statute under which it operated.

A comparison of the procedure followed by the Commission in this case, as set forth in the answer (Rec. 47) and in the statement of the case, *supra*, with that outlined in the statute will show that the Commission acted strictly within its statutory powers. Due notice was given and full hearing was accorded all parties who desired to be heard.

As stated above, Congress empowered the Commission, after holding a hearing as directed, to exercise its discretion as to issuing or refusing to issue a certificate. While plaintiffs allege that in doing so the Commission exercised judicial powers, it seems clear that it was exercising quasi-legislative or administrative functions under powers delegated, and under conditions prescribed, by Congress. It is of interest, in connection with this contention that the Commission was exercising judicial powers, to note from the bill of complaint that the deter-

mination of whether or not a railroad should be allowed to abandon its line of road is, under the laws of Texas, committed to the legislature or railroad commission of that State (Rec. 5, 18, and 21).

It has become well established that the courts will not interfere to control the Commission's decisions made in the exercise of its administrative discretion. In *Procter & Gamble* v. *United States, supra*, the court said, page 297:

> Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission, for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred although it may be not technically doing so.

And in *Interstate Comm. Comn.* v. *Ill. Cent. R. R.*, 215 U. S., 452, 470, 478, where the court was considering the validity of an order of the Commission, it said:

> Power to make the order, and not the mere expediency or wisdom of having made it, is

> the question. * * * Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the commission the power which has been lodged in that body to consider complaints as to violations of the statute and to correct them if found to exist, or attack as crude or inexpedient the action of the commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils.

The record before the Commission was not placed in evidence. Under these circumstances it would be impossible for the court to say that the Commission acted without evidence. In a somewhat similar situation this court said in *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S., 117, 125:

> But obviously we hardly could sustain a decision rejecting the reparation order upon the ground that there was not sufficient evidence before the Commission to support it when the whole of the evidence that was before the Commission was not produced.

See also, *O'Keefe* v. *United States*, 240 U. S., 294, 302, and *Louis. & Nash. R. R. Co.* v. *United States*, 245 U. S., 463, 466, wherein it was held that whether or not there was evidence to support the Commission's findings must be tested by a consideration of the evidence that was before the Commission.

As shown by the Commission's report, the tonnage handled by the Eastern Texas Railroad has fallen off greatly, since the removal of the Ratcliff mill, with a corresponding diminution of its revenues. Its operating expenses exceeded its operating revenues in 1918, 1919, and the first five months of 1920. Its operating ratio was 440 per cent under the rates in effect prior to the increase authorized in *Increased Rates*, 1920, 58 I. C. C., 220. If the road is to continue to operate, large amounts must be expended on roadway, bridges and trestles, with no reasonable expectation of earning operating expenses, let alone a return on the investment. Under the circumstances, and in view of this court's decision in *Brooks-Scanlon Co. v. R. R. Comm.*, 251 U. S., 396, the action taken by the Commission hardly can be called arbitrary.

III. Congress had the power to enact paragraphs (18) to (22), inclusive, of section 1 of the interstate commerce act.

It is a matter of common knowledge that, at the time the transportation act, 1920, was enacted, the problem of what to do with the railroads of the country which were engaged in interstate and foreign commerce was acute. Hearings were held by committees of the Senate and House, and a number of bills were introduced by senators and representatives. It was generally conceded that the railroads and systems of transportation under Federal control could not safely be turned back to their owners without legislation

of some sort designed to assist and protect them as instrumentalities of interstate and foreign commerce. Some of the provisions of the transportation act are of a temporary nature. Others, such as the provisions under attack, are permanent. All show an intent on the part of Congress to deal with the transportation problem in a comprehensive way. In the report of November 10, 1919, by the Senate Committee on Interstate Commerce to the Senate, accompanying S. 3288, it was said, page 18:

> Heretofore the regulation of transportation has been regarded merely as a restriction imposed upon particular carriers. For the first time it is proposed to look upon transportation as a subject of national concern and from a national standpoint.

Under the interstate commerce act, as amended by the transportation act, provision is made, among other things, by section 5, for the consolidation of carriers by railroad subject to the act, as defined in that section, into a limited number of systems under a national plan of consolidation adopted by the Commission (41 Stat., 480); the Commission is directed by section 15a to initiate, modify, establish or adjust rates which shall yield to carriers subject to the act, as defined in that section, a fair return upon the aggregate value of their railway property, devoted to the public use, as a whole or as a whole in each rate group which the Commission may designate (41 Stat., 488); and under section 20a the Commission is given power to regulate the issuance of securities by carriers

by railroad subject to the act, as defined in that section (41 Stat., 494).

The provisions now under attack are a part of a general scheme of legislation and can not be isolated and considered as if they were a separate and unrelated statute. That is, in order to assure adequate transportation facilities to the public, Congress has directed its agency, the Commission, to see that a fair return is yielded upon the aggregate value of the railroad property of the various instrumentalities of interstate commerce. And, as a part of the general scheme of regulation, it has given the Commission jurisdiction to determine in any case whether a carrier by railroad engaged in interstate commerce, which desires to abandon operation, should be permitted to do so; or whether a carrier engaged in interstate commerce shall be permitted to extend its line of railroad or to construct a new line of railroad.

On page 6 of appellants' brief it is said:

> * * * At the same time Congress seemed to have recognized that certain carriers would be a burden to the entire group because they would not earn more than the operating expense, and their values added to the total values would demand the fixing of a higher rate for all of the territory to which such carrier would not contribute its proportionate share. It was, therefore, provided that such carrier may be relieved either upon their own application or upon the Commission's initiative from engaging in interstate commerce—

as expressed by counsel in arguing the case in the court below, there would be dead limbs which a good husbandman would see fit to prune from its tree. To this theory, and thus far, we subscribe. We assert, however, that when Congress had withdrawn interstate commerce from such carriers, by giving permission for their abandonment, the full purpose of the act has been accomplished and no further action was authorized.

Appellants' theory, apparently, is that the certificate issued by the Commission simply authorizes the Eastern Texas Railroad to withdraw from the transportation of interstate commerce, and that this is all that the act contemplates, Congress having no power over intrastate commerce. With this interpretation of the statute we are unable to agree. A perusal of the certificate issued by the Commission will show that the carrier is "authorized to abandon the operation of all of said lines of railway now owned and operated by it * * * (Rec. 32)." Under paragraph (20), section 1, of the interstate commerce act, the carrier may proceed to comply with the terms and conditions in the certificate and proceed to abandon the operation of its road, "without securing approval other than such certificate * * *."

Aside from the legal and practical difficulties which would be encountered in attempting to restrict transportation to intrastate commerce, while refusing to carry similar interstate shipments, and which, to our minds, would prove insurmountable,

the unsoundness of the theory is demonstrated by the fact that it would effectually prevent the regulation of interstate carriers in this particular by Congress. Seventy-five per cent of the traffic of the Eastern Texas Railroad is interstate (Rec. 30). It is obvious that, if, as has been found by the Commission, the road can not support itself on all the traffic handled, it certainly could not live on 25 per cent of such traffic. Refusal by the State to permit abandonment would, under appellants' theory, make it impossible for the carrier to avail itself of the certificate issued by the Commission and thus destroy the power of Congress to prescribe the rule for the interstate carrier.

There is no occasion in this brief for tracing the history of the commerce clause or reviewing at length the many decisions wherein this court has expounded the powers of Congress under that clause and found them adequate to meet the changing conditions which the development of our country and of the means of transportation have presented from time to time.

The general rule as to legislation was stated as follows in *McCulloch* v. *Maryland*, 4 Wheat., 316, 420:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

It will be observed that the provisions of the statute under attack here are restricted to carriers by railroad subject to the interstate commerce act, i. e., carriers engaged in interstate commerce. The fact that regulation of such carriers may incidentally affect their relations to intrastate traffic can not destroy the power of Congress to deal with them. *Southern Ry. Co.* v. *United States*, 222 U. S., 20; *Nor. Pac. Ry.* v. *Washington*, 222 U. S., 370; *Southern Ry. Co.* v. *Reid & Beam*, 222 U. S., 444; *Atlantic Coast Line* v. *Georgia*, 234 U. S., 280, 292. In *Houston & Texas Ry.* v. *United States*, 234 U. S., 342, the court said, page 350:

> It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring "uniformity of regulation against conflicting and discriminating state legislation." By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control.

Gibbons v. *Ogden*, 9 Wheat., 1, 196, 224; *Brown* v. *Maryland*, 12 Wheat., 419, 446; *County of Mobile* v. *Kimball*, 102 U. S., 691, 696, 697; *Smith* v. *Alabama*, 124 U. S., 45, 473; *Second Employers' Liability Cases*, 223 U. S., 1, 47, 53, 54; *Minnesota Rate Cases*, 230 U. S., 352, 398, 399.

Congress is empowered to regulate—that is, to provide the law for the government of interstate commerce; to enact "all appropriate legislation" for its "protection and advancement" (*The Daniel Ball*, 10 Wall., 557, 564); to adopt measures to promote its growth and insure its safety" (*County of Mobile* v. *Kimball, supra*); "to foster, protect, control and restrain" (*Second Employers' Liability Cases, supra*). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from

> the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field.

Great stress is laid by plaintiffs upon their alleged contractual rights. This is merely another way of saying that a State can regulate interstate commerce or prevent Congress from regulating interstate carriers, for the form in which the State seeks to exercise the asserted power, whether in a State constitution, a statute, an order of a State commission or a charter or contract, can not change the substantial question as to whether the Nation or the State is supreme in regulating interstate commerce and the instrumentalities employed therein. In *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S., 467, 482, the court said:

> The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power

> in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable. The framers of the Constitution never intended any such state of things to exist.

In *Wilson* v. *New*, 243 U. S., 332, this court said, at page 349:

> That the power to regulate also extends to many phases of the business of carriage and embraces the right to control the contract power of the carrier in so far as the public interest requires such limitation, has also been manifested by repeated acts of legislation as to bills of lading, tariffs and many other things too numerous to mention.

Appellants attempt to use the contract between the State of Texas and the Eastern Texas Railroad to defeat the exercise by Congress of its power under the commerce clause. Whatever may be the rights and obligations of the parties named as between themselves, they can not be asserted in such a manner as to oust Congress of its power. In that respect the contract of the State of Texas stands in no different position from any other contract affecting the operation or regulation of interstate carriers. To appellants' theory, which, if sustained, would go far to destroy the well-rounded plan of regulation embodied in the interstate commerce act, the words of Chief

Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat., 1, 188, may well be applied:

> If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument—for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent—then we can not perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded.

It is respectfully submitted that the Commission conformed to the statutory authority conferred upon it, that it did not act arbitrarily, but based its report and certificate upon the evidence adduced before it, that the statute is constitutional and that the order of the District Court should be affirmed.

Walter McFarland,
Counsel for the Interstate
Commerce Commission.

P. J. Farrell,
Of Counsel.

APPENDIX.

Paragraphs (18) to (22), inclusive, of section 1 of the interstate commerce act.

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or

any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18)

of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

O

BRIEF FOR THE UNITED STATES

No. [illegible]

In the Supreme Court of the United States

October Term, 1971

The State of [illegible], [illegible] Governor, [illegible] and as Attorney General for the State of [illegible], Appellants,

v.

United States of America, [illegible] et al., Appellees.

Appeal from the United States District Court [illegible] District of [illegible]

BRIEF FOR THE UNITED STATES

[illegible]

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AUTHORITIES CITED.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE STATE OF TEXAS AND C. M. CURETON, personally and as Attorney General for the State of Texas, appellants, *v.* UNITED STATES OF AMERICA, AND CHARLES C. McCHORD, et al., constituting the Interstate Commerce Commission, et al., appellees.	No. 563.

APPEAL FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TEXAS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appeal is from a final decree of the District Court dismissing an original petition filed by the State of Texas to annul and enjoin the action of the Interstate Commerce Commission (Tr. 27, 31) in issuing a "Certificate of public convenience and necessity" (Tr. 31) to Eastern Texas Railroad Company authorizing the latter to abandon its railroad.

The District Court (Circuit Judge Walker and District Judges West and Estes all concurring) unanimously sustained a motion of the United States to dismiss (Tr. 50).

Without serious question of the sufficiency of the application of Eastern Texas Railroad Company to the commission for the certificate, or the regularity of the proceedings before that body, the whole case rests on the broad proposition that paragraphs (18), (19), (20), (21), and (22) of section 402, of the Transportation Act, 1920 (41 Stat. 477), are unconstitutional.

I.

THE FACTS.

Eastern Texas Railroad Company, as found by the commission (Tr. 27), filed its application for a certificate of public convenience and necessity to abandon its railroad extending from Lufkin, Angelina County, Tex., in a westerly direction 30.3 miles to Kennard, Houston County, Tex., with 4 miles of switches. At Lufkin the tracks connect with those of St. Louis Southwestern Railway, the Houston, East & West Texas, the Groveton, Lufkin & Northern Railway, the Texas Southeastern Railroad, and the Angelina & Neches River Railroad. It maintains a joint agency with the St. Louis Southwestern at Lufkin, and has agency stations at Ratcliff and Kennard. At other points it has 6 side tracks at which carload freight may be received or delivered. It owns 1 combination passenger, mail, and express car and has no other rolling stock. It rents 1 light locomotive

from St. Louis Southwestern. The only regular service is one mixed freight and passenger train daily, except Sunday, between Lufkin and Kennard.

Eastern Texas Railroad was incorporated under the general railroad incorporation laws of Texas, November 8, 1900, to construct a railroad from Lufkin to Crockett, Texas. It was promoted and financed by persons interested in Texas, Louisiana Lumber Co., a subsidiary of Central Coal & Coke Co. of Kansas City. It never received a land grant from the State, or exercised the right of eminent domain. Of its authorized capital stock ($1,000,000) shares with the par value of $154,500 have been issued. There are no bonds. On September 1, 1906, St. Louis Southwestern acquired all of the outstanding capital stock. The two companies have substantial identity of officers. On two attempts to consolidate since the purchase of the stock by the St. Louis Southwestern, the Legislature of Texas has refused permission unless Eastern Texas would agree to extend its line to Crockett, a town in Texas.

Eastern Texas Railroad was constructed primarily to serve the lumber company which then owned 116,000 acres of pine timber land near Kennard and which had constructed at Ratcliff one of the largest mills in the South. The mill ceased operations about 1917 (Tr. 28).

Eastern Texas Railroad largely serves cut-over timber lands. The soil is poor and the agricultural development is very limited except in the vicinity

of Ratcliff and Kennard. The area is sparsely settled, particularly between the two towns mentioned, where about 600 people live. There are no no other towns or villages along the line. Ratcliff has a population of 900 and Kennard 1,200. The timber from approximately 20,000 acres of land along the line is transported by other companies (Tr. 28).

Seventy per cent of the tonnage handled by the Eastern Texas in 1919 was forest products. Agricultural products were less than 10 per cent, and the remaining 20 per cent consisted of mixed commodities. The total of all commodities moved has decreased from 78,177 tons in 1913, to 21,352 tons in 1919, and 12,969 tons in the first five months of 1920.

The income of the Eastern Texas shows corresponding shrinkage. Its operating expenses exceeded its operating revenues by $9,699.66 in 1918, by $4,086.15 in 1919, and by $24,207.10 in the first five months of 1920. The total deficit incurred in 1918 was $20,128.46, in 1919, $49,362.64, and in January and February of 1920, $10,484.27. Eastern Texas estimated its total deficit for 1920 as $68,824.68, exclusive of large expenditures necessary for maintenance of way to put the road in safe operating condition. On May 1, 1920, the general balance sheet showed a credit balance of $32,393.68.

The people of the community objected to the granting of the certificate. They testified to the general conditions of the territory and the prospect

for future increases in tonnage, but they made no definite showing that within any reasonable time there would be sufficient tonnage to pay the operating expenses. To meet these objections Eastern Texas has offered to sell its line to any local interests for $50,000 (Tr. 30, 31).

On a careful finding of facts made after full hearing, of which all parties had due notice, the commission issued the certificate. After certain recitals with respect to the statute, the application, the notices and publication thereof, the hearing, the finding of facts which is made a part of the certificate, and a certification that "the present public convenience and necessity permit of the abandonment," it is provided (Tr. 32):

> *It is therefore ordered*, That the Eastern Texas Railroad Company be, and it is hereby, authorized to abandon the operation of all of said lines of railway now owned and operated by it; and to take up, dismantle, or remove any part or all of the property of said company; and in any lawful manner to dispose of any or all parts of said property so taken up, dismantled, or removed, or as it is now situated.
>
> *Provided, however*, That the Eastern Texas Railroad Company shall first offer all of the property now owned by it for sale, free of all encumbrances, for a sum not to exceed $50,000 to any party or parties interested in the community served by said road on condition that the purchaser at such sale shall continue the operation of said lines of railroad.

II.

THE PLEADINGS.

With a copy of the report of the commission and the certificate attached, the petition broadly alleges that the Eastern Texas Railroad Company was incorporated under and by virtue of the laws of the State of Texas and that it and all of its affairs are subject thereto. Emphasis is made of those provisions of the constitution of Texas and of the laws passed in pursuance thereof with respect to railroads which provide "that railway corporations shall receive, transport, and deliver passengers and freight upon payment of the legal fares, rates, or charges," and "such corporations are prohibited under penalty from refusing to do so, or from abandoning the operation of their trains, *or from abandoning their roads or any part thereof*, or failing to resume the operation of their lines when ordered to operate them by the State Railroad Commission" (Tr. 15).

It is further alleged that "these laws prohibit such corporations from abandoning the operation of their trains, and from taking up and removing their main tracks when once constructed and operated; except, as under actual practice, the legislature grants consent, or except under conditions named in the statutes, the Railroad Commission of Texas consents thereto" (Tr. 18).

It is further alleged (Tr. 17) "that the Government of the United States and the Congress, which is its

agency for legislative matters, and the Interstate Commerce Commission, a legislative and administrative agency created by the Congress of the United States, have no judicial authority authorizing them to determine any justiciable question where the rights of the State are involved; that justiciable controversies between the State of Texas and a sovereign State or the United States can only be determined under the Constitution of the United States, particularly under article 3, section 2, and the eleventh amendment to the Constitution of the United States; in the Supreme Court of the United States; and can not be determined before any other court nor before any legislative body or before Congress, nor before any legislative or administrative board or commission, nor before the Interstate Commerce Commission of the United States; that no citizen of the State of Texas, no citizen of any other State, and no corporation of any kind or character can bring an action against the State of Texas, or against those lawfully acting for it as public officers, in any court, nor before the Interstate Commerce Commission of the United States, without the consent of the State of Texas; and that such consent has not been granted by the State of Texas."

It is further alleged that "notwithstanding the aforesaid constitutional provisions, the Interstate Commerce Commission act, as amended by section 402 of the Transportation Act of 1920, was passed in

violation thereof and particularly are subdivisions 18, 19, 20, 21, and 22 of said section 402, being the sections by authority of which the Interstate Commerce Commission acted in granting the order complained of herein, in violation of the Constitution of the United States and particularly of the provisions herein above set out" (Tr. 17).

The paragraphs referred to are alleged to be unconstitutional in that they violate (Tr. 20)

(*a*) The tenth amendment which reserves to the States and the people all power not granted to the United States nor prohibited to the States.

(*b*) Subdivision 3, section 8, article 1, which limits the authority of Congress to the regulation of interstate and foreign commerce.

(*c*) The eleventh amendment, which prohibits suits against the State.

(*d*) Sections 1 and 2 of article 3, which confer exclusive jurisdiction over justiciable controversies upon the Supreme Court and inferior courts of the United States.

(*e*) The fifth amendment, which prohibits the taking of property without due process of law.

The motion of the United States to dismiss raises two broad questions:

1. The true interpretation of the law.
2. Its validity under the Constitution.

III.

THE STATUTE.

Paragraphs (18), (19), (20), (21), and (22) (41 Stat. 477), section 402 (41 Stat. 476), transportation act, 1920 (41 Stat. 456), follow *in extenso*.

> (18) After ninety days after this paragraph takes effect no carrier by railroad subject to this act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.
>
> (19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission may from time to time prescribe, and the provisions of this act shall apply to all such proceedings. Upon receipt of any application for such certificate the com-

mission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the com-

mission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this act, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the commission finds, as to such extension, that it is reasonably required in the interest of such public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this act which refuses or neglects to comply with any order of the commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

IV.

THE HISTORY OF THE TIMES.

As a means of ascertaining the "history of the times" or "the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted," the reports and debates may properly be resorted to. (*United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 316, 320; *Standard Oil Co. v. United States*, 221 U. S. 1, 50.)

Senator Cummins, chairman Senate Committee Interstate and Foreign Commerce, on November 10, 1919, laid before the Senate the report of the committee, a copy of which appears as Appendix A. This very able and comprehensive report fully explains the purposes of the act and the conditions, especially that of the railroads, which necessitated its enactment.

Congressman Esch (Wisconsin), on November 11, 1919, in reporting the railroad bill to "the Committee of the Whole House" on the state of the Union for the consideration of bill H. R. 10453, said:

In section 402 we treat of extensions and abandonments. We believe one main cause of the so-called "weak sister" has been the unrestricted right of railroads to be built wherever their projectors thought fit. As a result of this unrestricted right we find in all States of the Union cases where, after a road has been built and long maintained and has gotten its traffic well established, another road puts in a parallel line with the usual result that instead of having one strong road doing the traffic we have two weak roads, as they have to charge the same rate between competitive points, and we burden the public by compelling it to sustain two weak roads when one strong road would have been sufficient.

How does this bill stop that? In this way: Before a road or an extension thereof can be built it must get what is called in this bill a certificate of convenience or necessity from the commission as a condition precedent to the building of a single rod of the extension or of the new line. That means that the commission must first investigate the situation. It must first consult the communities that would be connected or would be located on the proposed line. It must consult the shipping interests and producing interests and all other interests that might be involved and then determine whether or not it should issue a certificate of convenience and necessity.

This is not new law. Several of the States have this same kind of law now, notably the State of New York and the State of Wisconsin

and other States, and the law has worked successfully. It has prevented the construction of new lines that could not by any possibility have any hope of meeting operating expenses, not to say anything about profits. It would prevent the construction of some of these short lines which may have no hope of ultimate financial success. In every way we have felt that this provision would lessen the number of "weak sisters," would prevent the creation of any new ones, and would strengthen the existing lines. We can get better service by strengthening the existing line than by creating a rival or parallel line which would diminish the ability of the first line to make further improvements and betterments. We have also provided for abandonments.

Railroads sometimes desire to surrender the rights granted by their charter. The traffic is not what they expected, business conditions change, the natural resources they thought first to get out to the open market become depleted or become exhausted. There is no power now to restrain abandonment under Federal law. Railroads in many States can do as they will. We provide that there shall be some Federal control over the matter of abandonment, so that cities and villages that have been built up on these lines can be given due consideration by the regulatory body before the order for abandonment is issued. We give such control to the commission to investigate the situation and determine the facts. But neither provision, the building of new lines or the abandonment of old ones,

affects spurs or switches or terminal tracks or interurban lines wholly within a State. These we leave to State control, where they already belong. (Con. Rec., vol. 58, pt. 8, 8309, 8316.)

ARGUMENT.

V.

THE INTERPRETATION AND CONSTITUTIONALITY OF THE LAW.

Primarily it is necessary to determine the true interpretation of the portion of the Transportation Act now in controversy, for the State of Texas concedes the validity of the law if its interpretation be accepted, but on the other hand it assails the constitutionality of the law if the Government's interpretation be accepted.

When the bill was filed in the court below the State of Texas evidently accepted the Government's interpretation, for the bill is mainly based upon the challenge to the power of Congress under the Constitution to enact these laws, but in the brief now filed the State of Texas suggests another interpretation of the law, and, as stated, concedes its constitutionality as thus interpreted.

The two positions with respect to the meaning of the law may be thus stated:

The State of Texas claims that the law simply means that when the Interstate Commerce Commission issues a "certificate of necessity" it only authorizes the carrier to abandon *its interstate*

traffic but that it does not authorize the carrier to abandon *its intrastate traffic*, as that question is one to be determined by the authorities of the State in which the railroad is situated or by the State which incorporated the carrier.

We have seen that the primary purpose Congress had in view, in enacting the provisions of law under consideration here, was to eliminate waste of transportation energy, and thus enable carriers to provide and furnish adequate facilities for the transportation of interstate and foreign commerce, and also of intrastate commerce, without imposing an undue burden upon the traveling and shipping public; but, if it be true that the power of Congress under the Constitution is exhausted as soon as it deals with extensions and abandonments as applied to interstate and foreign commerce and before the subject of intrastate commerce is reached, it is apparent that, as a practical matter, the purpose mentioned cannot be accomplished. If the power of Congress to prevent unnecessary extensions and to eliminate the expenditures, which result from the operation of facilities in excess of those required to meet the convenience and necessity of the general public, cannot be made effective, unless the action is concurred in by the authorities of an interested State, that power as a practical matter cannot be effective, because experience of the past has demonstrated that where different tribunals have equal authority over the same subject-matter irreconcilable conflicts are certain to ensue.

In construing these sections it must therefore be obvious that if the construction advanced by the State of Texas be accepted, this portion of the Transportation Act loses its chief efficacy. This is so because of the unified character of the business of transportation for most practical purposes. If the Interstate Commerce Commission only had power to authorize the carrier to abandon its interstate business and was impotent to give like authority to abandon its intrastate commerce, then in most cases the certificate of authority would not be worth the paper it was written on. This must be so, for naturally and almost inevitably a railroad corporation does not abandon its railway, upon which it has expended capital, unless the business has ceased to be profitable and it is clear that if the business be unprofitable, when the railroad has the advantage of revenue from both interstate and intrastate traffic, it would be even more unprofitable if it could only abandon one part of its business. In such event its income would be lessened but its expenses would not be appreciably diminished. The same railroad tracks, tunnels, bridges, terminals, etc., which formerly carried both classes of traffic would still be necessary to carry one class of traffic. Thus the last state of the railroad would be worse than the first, and no case better illustrates the unreasonableness of this construction than the pending case.

Here is a railroad that in recent years has been steadily losing money. Seventy-five per cent of its traffic is interstate and twenty-five per cent intra-

state. For the Interstate Commerce Commission to authorize it to abandon its interstate traffic but without authority to authorize a similar abandonment of intrastate traffic would be about as effective as the permission of the fond mother who permitted her daughter to go out to swim provided she did not go near the water. The Interstate Commerce Commission committed no such folly. It authorized the abondment of "the operations of all of said lines of railway," not its interstate traffic alone. (*Ante*, p. 5.)

The practical result of any other interpretation would be that the railroad carrier, which could no longer profitably operate its road, could not abandon it without receiving the consent of both the Interstate Commerce Commission and the State Railroad Commission. This would mean the very conflict of authority which the law in question sought to avoid when it explicitly provided as follows:

> From and after issuance of such certificate, and not before, the carrier by railroad may, *without securing approval other than such certificate*, comply with the terms and conditions contained in or attached to the issuance of such certificate *and proceed* with the construction, operation, or abandonment covered thereby.

Mark the significant words "and proceed." To proceed is to go ahead without further legal requirements. How can it "proceed" if it must first make its peace with the State, which may refuse?

Manifestly, the reference to the exclusion of any other authority can not refer to any Federal author-

ity, for this class of transportation problems is not committed to any other Federal agency. It can only refer to the governmental authority of the States. If this be not its meaning it is difficult to say what its meaning could be.

Fortunately, this is not left to mere inference, for the four paragraphs (18 to 22) make it perfectly clear that Congress was legislating with reference to railroad carriers as unified instrumentalities, and that it was not legislating merely with reference to its interstate business. Paragraph (18) begins:

> No carrier by railroad subject to this act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

It will be noted that in this section there is no reference to the interstate or intrastate business of the railroad. The act deals with the unified instrumentalities of commerce, although it is undoubtedly true that the power of the Federal Government over such unified instrumentality is by reason of the fact that the carrier has engaged in interstate commerce and thus has come within the regulatory power of the Federal Government.

Paragraph (19) further manifests the clear purpose to determine the question as an entirety and not as a fragment, for the provision that upon the institution of proceedings "notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, *with the right to be heard* as hereinafter provided with respect to the hearing of complaints or the issuance of securities." This can only mean that if the State has any reason to submit why the railroad in question should not be extended or abandoned that it should have an opportunity to be heard.

Having thus given the State, as it were, its day in court, the act (par. 20) provides that the Commission in issuing the certificate "may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." It was evidently intended that the Interstate Commerce Commission should, in granting its certificate, take into account the just

claims of the State. Indeed, the question of public convenience and necessity is left to the Commission when it is provided that it may attach to the certificate such terms and conditions "as the public convenience and necessity may require." Note that the act does not say that the certificate may contain such terms and conditions as the interest of the interstate commerce or even the Federal Government may require; it is the public convenience and necessity, which fairly comprehends the interest of the State and Nation, indeed of the public generally, that the Commission is to consider.

Then follows the significant statement that when the certificate is issued "the carrier by railroad may, *without securing approval other than such certificate*, comply with the terms and conditions contained in or attached to the issuance of such certificate *and proceed* with the construction, operation, or abandonment covered thereby."

What can this mean except the authority to go ahead with the extension or abandonment without consulting any other authority. As previously stated, the words "*may proceed*" are most significant. They mean action and not delay, and were not intended to involve the railroad carrier, which was losing money, in a tangled skein of Federal and State authority.

Moreover, paragraph (20) provides for the power, if this procedure be not followed, of the Commission, or "any commission or regulating body of the State or States affected, or any party in interest," to go into court and enjoin the extension or abandonment of the railroad unless the procedure enacted by

Congress be followed. Then follows the statement that any carrier which does not comply with the requirements of the statute can be criminally prosecuted and fined or imprisoned in the discretion of the court.

Finally, there is one further indication of the purpose of the law—in paragraph (22), when it expressly excepts the abandonment of local transportation facilities like "spur, industrial, team, switching or sidetracks, * * * street, suburban, or interurban electric railways."

Under all these circumstances can it be reasonably contended that the Congress simply intended to authorize the abandonment of interstate traffic? I appreciate the disposition of the court, where a question of constitutionality is involved, to accept any *reasonable* construction of the statute which avoids the grave question of constitutionality. But this salutary principle can not be pushed to the extreme of defeating the manifest public policy of the Nation by making almost wholly nugatory the statute, for I again affirm that if the construction of the State of Texas be correct, then the statute is almost valueless, for, as in this case, the carrier, notwithstanding the fact that it now has authority from the Interstate Commerce Commission to abandon its unprofitable railroad, can not do so without the consent of the State of Texas, and that consent has been withheld. Is it possible that Congress intended that its wise provisions should only end in a blind alley of negation?

VI.

The State of Texas may not seriously claim that the Eastern Texas Railroad should continue operations at a loss.

Passing the fact that the gulf is fast widening between operating revenues and operating expenses, the commission noted that the Eastern Texas estimated that "if operation is continued it will be necessary within the next two years to expend \$146,000 to \$200,000 on roadways, bridges, and trestles, due largely to deferred maintenance attendant on the operation of the line at a loss" (Tr. 30).

In *Bullock* v. *Railroad Commission* (254 U. S. 513, 520, 521) the relators sought a prohibition forbidding a State judge of a lower court to confirm a sale of a railroad "for the purpose of and with the privilege on the part of the purchaser of dismantling the same" as authorized by a foreclosure decree. In delivering the opinion Mr. Justice Holmes said:

> Apart from statute or express contract people who have put their money into a railroad are not bound to go on with it at a loss if there is no reasonable prospect of profitable operation in the future. (*Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana*, 251 U. S. 396.) No implied contract that they will do so can be elicited from the mere fact that they have accepted a charter from the State and have been allowed to exercise the power of eminent domain. Suppose that a railroad company should find that its road was a failure, it could not make the State a

party to a proceeding for leave to stop, and whether the State would proceed would be for the State to decide. The only remedy of the company would be to stop, and that it would have a right to do without the consent of the State if the facts were as supposed. Purchasers of the road by foreclosure would have the same right.

In *Brooks-Scanlon Co. v. Railroad Commission* (251 U. S. 396, 399), Mr. Justice Holmes, speaking for the court, said:

> A carrier can not be compelled to carry on even a branch of business at a loss, much less the whole business of carriage. On this point it is enough to refer to *Northern Pacific Ry. Co. v. North Dakota* (236 U. S. 585, 595, 599, 600, 604), and *Norfolk & Western Ry. Co. v. West Virginia* (236 U. S. 605, 609, 614). It is true that if a railroad continues to exercise the power conferred upon it by a charter from a State, the State may require it to fulfill an obligation imposed by the charter even though fulfillment in that particular may cause a loss. (*Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262, 276, 278.) But that special rule is far from throwing any doubt upon a general principle too well established to need further argument here. The plaintiff may be making money from its sawmill and lumber business but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it. If the plaintiff be taken to have granted to the public an

> interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss. (*Munn* v. *Illinois*, 94 U. S. 113, 126.) The principle is illustrated by the many cases in which the constitutionality of a rate is shown to depend upon whether it yields to the parties concerned a fair return.

The five paragraphs of the act which are challenged deal with the construction of new lines or extensions and the abandonment of all or any portion of a line, as correlated subjects.

Those paragraphs should also be read in conjunction with section 209, which provides for guaranty to carriers after termination of Federal control (41 Stat. 464); and section 422, amending section 15–A, which authorizes the commission, for two years beginning March 1, 1920, to fix rates on the basis of a "fair return," and directs that it shall take "as such fair return a sum equal to $5\frac{1}{2}$ per centum of such aggregate value * * *" (41 Stat. 488); and section 210 which provides (41 Stat. 468) that "for the purpose of enabling carriers properly to serve the public during the transition period immediately following the termination of Federal control, any such carrier may * * * make application to the commission for a loan from the United States, setting forth the amount of the loan and the term for which it is desired, the purpose of the loan and the uses to which it will be applied, the present and prospective ability of the applicant to repay the loan and meet the requirements of its obligations in that regard, the

character and value of the security offered, and the extent to which the *public convenience and necessity will be served.*"

The application shall be accompanied by statements "showing such facts and details as the commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of granting the loan applied for and the ability of the applicant to make good the obligation as the commission may deem pertinent to the inquiry."

Imagine the grotesque spectacle of the Eastern Texas Railroad, which was under Federal control during 1918, 1919, and the first two months of 1920 (Tr. 29), filing with the commission an application for a loan showing that it owns 30 miles of railroad located in the unproductive cut-over timber regions of Texas, 1 combination car, and 1 rented locomotive; that its operating expenses are exceeding its operating revenues by about $5,000 per month and that "if operation is continued it will be necessary within the next two years to expend $146,000 to $200,000 on roadways, bridges, and trestles, due largely to deferred maintenance attendant on the operation of the line at a loss" (Tr. 30).

It is difficult to conceive of a power more wholesome than that which authorized the commission to issue this certificate.

I do not want to stress unduly this feature of the case, of which much was made on the oral argument in the suggestions from the Bench; *for the purpose of the law is as applicable to a profitable as to an unprofitable railroad, and the questions of interpretation and constitutionality are the same with respect to both.* Suppose, for example, that this road had been profitable, but that its continued operation was a needless drain on the revenues of the interstate carrier, because it could render the same service by another line of track. In such an event, the argument that the restriction of the statute to the interstate business of the carrier can do no harm, because the State could not force the railroad company, as a domestic carrier, to run at a loss, necessarily fails. In either event, there must be a power lodged somewhere to determine whether a useless line of track, even though profitable, may be abandoned in order to end a needless drain on the revenues of a company which is in part an interstate carrier, and therefore a needless drain on interstate commerce and the Government, which is supporting it by its credit and funds.

VII.

THE QUESTION OF CONSTITUTIONALITY.

If Congress may directly or through appropriate agencies condemn defective or inadequate equipment and facilities of interstate carriers irrespective of the nature of the traffic, whether interstate or intrastate, a fortiori, it may authorize a railroad engaged in interstate transportion, which consists mainly of an accumulation of all or many of these things, to cease operations.

This railroad is an instrumentality of interstate commerce, as interstate traffic comprises approximately 75 per cent of the total tonnage (Tr. 30). The power and authority of Congress and its appropriate agencies over it are none the less applicable because of the hopeless financial condition of the company or because it has the dual character of an interstate and intrastate carrier.

The power of Congress or its appropriate agencies over the following functions and activities of interstate carriers, without respect to the distinction between their interstate and intrastate business, is now established:

Wages of pilots (*Cooley* v. *Board of Wardens*, 12 How. 299; *Ex parte McNiel*, 13 Wall. 236).

Color blindness, qualification of employees (*Nashville, C. & St. L. Ry. Co.* v. *Alabama*, 128 U. S. 96).

Hours of service (*Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612).

Safety appliances, automatic couplers (*Johnson* v. *Southern Pacific Co.*, 196 U. S. 1).

Seamen's wages shall not be paid in advance (*Patterson* v. *Bark Eudora*, 190 U. S. 169).

Agreements restraining commerce forbidden (*Northern Securities Co.* v. *United States*, 193 U. S. 197).

Illegal boycotts (*Loewe* v. *Lawler*, 208 U. S. 274).

Full crews (*Chicago, R. I. & P. Ry. Co.* v. *Arkansas*, 219 U. S. 453; *St. Louis, I. M. & S. Ry. Co.* v. *Arkansas*, 240 U. S. 518).

Distribution of equipment, coal cars (*Interstate Commerce Comn.* v. *Illinois Central, R. Co.*, 215 U. S. 452; *Interstate Commerce Comn.* v. *Chicago & Alton R. Co.*, 215 U. S. 479).

Pre-cooling and pre-icing of refrigerator cars (*Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 232 U. S. 199, 221).

Joint use of terminals for switching (*Pennsylvania Co.* v. *United States*, 236 U. S. 351, 373; *Louisville & N. R. Co.* v. *United States*, 238 U. S. 1).

Pipe lines (*The Pipe Line Cases—Ohio Oil Co.* v. *United States*, 234 U. S. 548).

Stock yards (*United States* v. *Union Stock Yard Co.*, 226 U. S. 286).

Books of account and records of all business, including intrastate business (*Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194).

Bills of lading (*United States* v. *Alaska S. S. Co.*, 253 U. S. 113).

Headlights on locomotives (*Atlantic Coast Line R. Co.* v. *Georgia*, 234 U. S. 280).

Running of separate trains instead of mixed freight and passenger trains (*Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262, 269).

Car doors (*Loomis* v. *Lehigh Valley R. Co.*, 240 U. S. 43).

Contracts between employee and employer (*Patterson* v. *Bark Eudora*, 190 U. S. 169; *Robertson* v. *Baldwin*, 165 U. S. 275; *McLean* v. *Arkansas*, 211 U. S. 539; *Erie R. Co.* v. *Williams*, 233 U. S. 685).

Ash pans on locomotives (*Ash Pan Act*, 35 Stat. 476).

Locomotive boilers (*Boiler Inspection Act*, 36 Stat. 913).

Block signals (joint resolution, 34 Stat. 838; urgent deficiencies act, Oct. 22, 1913, 38 Stat. 212).

Live stock shall not be confined in cars for period exceeding 28 hours (*United States* v. *Baltimore & O. S. W. R. Co.*, 222 U. S. 8).

Employers' liability (*Second Employers' Liability Cases*, 223 U. S. 1).

Tickets (*Commutation Rate Case*, 27 I. C. C. 549).

In all these cases the carrier is treated—as is inevitable—as a *unified* instrumentality.

In *Second Employers' Liability Cases*, *supra*, this court said:

> As is well said in the brief prepared by the late Solicitor General: "Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed ap-

propriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable, or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical, and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act." (*Second Employers' Liability Cases*, 223 U. S. 1, 48.)

In *Baltimore & Ohio* v. *Interstate Commerce Commission* (221 U. S. 612, 619, *supra*) it was held that the hours of service act of March 4, 1907 (34

Stat. 1415, c. 2939), was not to be denied effect because of "the commingling of duties relating to interstate and intrastate operations."

When Congress provided for the abandonment of the railroad "without securing approval other than such certificate" (par. 20), it followed these well-recognized illustrations of the unity of instrumentalities of commerce for many purposes.

VIII.

The Transportation Act.

Here I might profitably rest the argument, for I have shown, by concrete cases, the unity of the instrumentalities of commerce in the exercise of the Federal power to regulate interstate commerce. This case, however, is only one of a number of cases in which the validity of the Transportation Act of 1920 has been challenged in behalf of one or more States. I refer to the Wisconsin Rate Case (in which this court has recently ordered reargument), the New York State Rate Case, the instant case, and the more comprehensive challenge to Federal authority involved in the case which is soon to be argued, namely, the *State of Texas* v. *The Interstate Commerce Commission and The Railroad Labor Board*. The State of Texas has been foremost in this challenge to the power of the Federal Government, and in the last-named case has filed a bill which challenges nearly every provision of the Transportation Act.

It seems necessary, therefore, that I should meet this challenge now, at least to the extent of indicating the broad lines upon which the constitutionality of the Transportation Act should be defended, for while this case involves only a minor feature of that beneficent law, yet, in principle, it brings into question the many other constructive provisions, which unquestionably have opened up a new chapter in the great volume of the Federal regulation of interstate commerce. I propose, therefore, in this argument, briefly, but inadequately, to vindicate the broad principle upon which the validity of the Transportation Act must rest, and, in so doing, I shall base my argument upon two clauses of the Constitution—(1) the commerce power and (2) the war power.

IX.

The commerce power.

If the commerce power be not broad enough to determine whether an interstate carrier, even though incorporated under the laws of the State, may abandon its business for lack of public patronage as an entirety, and without respect to the division between interstate and intrastate commerce, then it is obvious that our political institutions are not in harmony with the present conditions of human society.

For example, take the concrete case: Here is a railroad running between two points in the State of Texas upon which, as upon nearly every intrastate rail-

road, interstate traffic both originates and terminates. This railroad is something more than a parallel line of steel rails nailed to railroad ties. The living things are the human beings who operate them, and these human beings are permitted to unite in an artificial personality of a corporation; and this corporation, thus constructing and operating the railroad, is an instrumentality of commerce so important and indispensable that, without it, few, if any, railroads would operate. To enable this corporation to carry on its operations it must not only deal with the regulations of our political form of government but must also inevitably take into account the great forces and conditions of commerce. Thus the corporation finds itself subject to regulation not merely by the political state but by the larger organism which we call human society.

It must obtain credit, and, to this end, it must go to the great sources of credit—the banks.

These banks, in loaning their credit and furnishing the necessary means of constructing the railroad, take no account of the legal distinction between interstate and domestic commerce. They loan to the corporation as a unit, and no dollar of the funds which they supply can be allocated by any rule either to interstate or intrastate commerce.

The contractors, engineers, and builders of the road are also unable, in the nature of things, to regulate their operations by any legal distinction between interstate and intrastate commerce. The road that they grade, the ties that they lay, the rails that

they nail down, the tunnels they dig, the terminals they erect, the rolling stock that is constructed are one and all used quite indiscriminately in interstate and domestic commerce and without any legal distinction between them. Mechanically, as financially, the corporation is an indivisible unit.

Then, the road must be operated by labor; and here arises a source of nongovernmental regulation which has meant a tremendous burden upon the transportation companies, for labor is highly organized and the corporation deals with its leaders, and these leaders, in prescribing the conditions upon which engineers, firemen, conductors, and brakemen will operate the roads, take no account of any distinction between interstate and intrastate commerce, but, themselves acting as a unit, they render their services to the corporation as a unit—even as the financier and the contractor have done.

The very act of transportation again illustrates the indivisibility from a practical standpoint and not as a legal abstraction of this indivisible thing that we call commerce, for, whether the transportation be wholly within or beyond the State, it runs upon the same rails, it pierces the same tunnels, it employs the same motive power and rolling stock, and the same train moves for one passenger in intrastate commerce and for another in interstate commerce, but, as stated, its propulsion is due to economic and mechanical forces that have no reference to the legal distinction.

If, therefore, the legal distinction which seeks to make a duality of an essential unity does not

conform to the nature of these economic forces, then it is obvious that our political institutions are not only not in harmony but are lagging behind the economic forces which they are designed to protect and promote.

Fortunately, there is no such rigidity in our political system. Its genius lies in its elasticity and in its adaptability to the ever increasing changes of the most progressive nation in the world. The far-seeing vision of the great Chief Justice realized this in the great case of *McCulloch v. Maryland* (4 Wheat. 316, 415), when he said:

> This provision is made in a Constitution intended to endure for ages to come and consequently to be *adapted* to the various crises of human affairs.

In other words, the evolution of the commerce power of the country has been a consistent adaptation of Federal power to the crises, which have been brought about by a mechanical age, which has more profoundly revolutionized human thought and human conditions than any similar change in all the preceding centuries of human existence.

It may be frankly admitted that when the framers of the Constitution provided that "the Congress shall have power to regulate commerce * * * among the several States" they did not have in mind, and in the nature of the case could not have had in mind, the application of this grant of power to the conditions of human society which were about to be profoundly revolutionized. Undoubtedly, they did not intend, as conditions

of society then prevailed, to take from the States the primary regulation of the instrumentalities of commerce. In that day there were very few corporations, and those almost exclusively banking institutions. Indeed, their idea of commerce was largely restricted to sailing vessels which bore merchandise from the port of one State to the port of another State. It was not within their contemplation that it would be applied to the conditions of land travel.[1]

A condition in which land travel would be revolutionized by the utilization of steam power was beyond their anticipation, for, when the Constitution was adopted, the only vehicles of commerce outside of the sailing vessel were the horse, the stagecoach, and the wheelbarrow. More than half a century was to elapse before the first railroad should be commenced, and, while at the very time of the constitutional convention a Connecticut Yankee, by the name of Fitch, was experimenting with the steamboat, a full generation was to pass before the prow of the *Clermont* was to divide the waters of the Hudson.

[1] In 1802 the Supreme Court of Connecticut sustained a suit brought against the owner of a stagecoach engaged in transportation between Westfield, in Massachusetts, and Albany, in New York, for carrying passengers within the State of Connecticut in violation of a law of that State, which granted an exclusive right to the plaintiff to engage in such transportation. (*Perrin v. Sikes*, 1 Day (Conn.), 19.)

In Maryland and Virginia also the right to carry passengers had been granted as a monopoly, and it appears that these laws were construed as applying to travel between States. (McMaster's History of the American People, vol. 2, p. 60; *Conf. Conway v. Taylor's Executor*, 1 Black, 603.) Furthermore, as showing the view of this matter in Congress, it is said that a motion was made in the second Congress to permit stagecoaches carrying the mails from State to State to transport passengers also, but that the motion was lost as being in violation of the rights of the States. (McMaster's History of the American People, vol. 2, p. 60.)

The fact is that in those days the primary regulation of commerce, whether interstate or domestic, could, in the nature of the case, only be for the States. Men lived and died without ever leaving the communities in which they were born. Only a few, and those the wealthy, ever crossed the boundary of the State. Each community was sufficient to itself. Human society was then not so highly organized that a man would feel impoverished if the four corners of the world did not pay tribute to his breakfast table. With few exceptions, men lived upon that which was raised within their immediate vicinity, and even that which they themselves developed. It was still the time when Adam delved and Eve span, and the idea that the Congress should regulate their little commercial enterprises, which were almost wholly intrastate and conducted by individuals, not corporations, was to them inconceivable.

What, then, did the Fathers truly intend by this inspired grant of power? It is my belief that their true intention was that the new government which they were creating should have a concurrent *but a paramount power*, and that this paramount power would only be exercised when the regulations of the States resulted in conflicting regulations to the common injury of all. The Federal Government was to be the arbiter, or, shall I say, its function was to be that of the governor in a machine.[2]

[2] In *Gibbons* v. *Ogden*, 9 Wheat. 1, 199, 209, Mr. Chief Justice Marshall said that the commercial power is a whole, incapable of division, and therefore exclusive of a like power in a coordinate sovereignty. The power to tax is an instance of a power which is, in its nature, divisible. "Taxation is

That this was the immediate application of their far-reaching grant of power is indubitably shown by the fact that for nearly one hundred years the Congress did not regulate land transportation by any legislation, excepting only the grants which it made to the trans-continental railroads shortly after the Civil War.

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the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. * * * When, then, each government exercises the power of taxation, neither is exercising the power of the other. But when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce. * * * It has been contended by the counsel for the appellant that as the word to "regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated. There is great force in this argument, and the court is not satisfied that it has been refuted."

That this was the first view which generally obtained upon this subject appears from the earliest constructions placed upon this clause. In the opinion upon the United States bank bill presented by Edmund Randolph, then Attorney General, to President Washington, on the 12th of February, 1791, in commenting upon the powers of Congress over commerce among the States, Mr. Randolph says that these powers "are little more than to establish the forms of commercial intercourse between the States, and to keep the prohibitions which the Constitution imposes on that intercourse undiminished in their operation; that is, to prevent taxes on imports or exports; preferences to one port over another, by any regulation of commerce or revenue; and duties upon the entering or clearing of the vessels of one State in the ports of another." Prentice & Egan on the Commerce Clause.

Even Alexander Hamilton, in his opinion upon the same subject, rendered to Washington 11 days later, while earnestly defending this provision of the Constitution as a substantial and extensive grant of power, nevertheless makes no reference to any consequent limitations upon the authority of the States. Prentice & Egan on the Commerce Clause.

The creation of corporate instrumentalities, the regulation of both intrastate and interstate roads, as well as all other regulations of commerce, were primarily the concern of the States, but at all times subject to the paramount authority of the Federal Government to bring them into harmony, in order to avoid the evils of conflicting regulations which had been the chief reason for the creation of the new Nation. Moreover, in the early days of railroad transportation there were insuperable natural obstacles to the creation of great interstate carriers. Railroads were very primitive affairs—so primitive that for many years after the building of the first railroad it was a subject of earnest and heated discussion among thoughtful men whether the canal or the railroad would be the true method of transportation. Railroads could not then tunnel mountains or cross rivers; of necessity, their operations terminated whenever a natural obstacle was interposed. Thus, between Albany and Buffalo there were, as late as the middle of the nineteenth century, eleven different railroads. The journey to New York was made from Philadelphia to Perth Amboy, when a ship was taken to cross Sandy Hook Bay. The Pennsylvania Railroad ran from Philadelphia to Columbia, and when it finally reached the Allegheny Mountains it necessarily came to a stop, and passengers were taken by a portage road over the Alleghenies and then a new railroad took them to Pittsburgh.

The natural obstacles which thus made for small railroads naturally resulted in their primary and almost exclusive regulation by the States; and the policy of the States was to give almost unrestricted rights of private ownership, for the obvious reason that there was so little faith in the future of American railroads that the States would not contribute out of public funds and the money was contributed by citizens not as a sound financial investment but practically as a public charity. Thus, the subscriptions to the Pennsylvania Railroad were obtained by begging them from house to house, as though it were a hospital and not a necessary instrumentality of commerce.

All this made for the localization of railroads and for unrestricted rights of private ownership, and it is not unnatural that the abuses of such unregulated private ownership led to some of the blackest chapters in the financial history of our Nation.

During all this time a system of legal regulation was in the slow process of development—not by "the Congress," to which the Constitution had directly intrusted it, but by the judiciary, and notably by this court. In this was no usurpation of power, for this system of regulation by judicial veto was derived from the powers of this court as established in the great case of *Marbury* v. *Madison*. In other words, the written Constitution would not have been workable if there had not been a balance wheel to keep all the parts in harmonious operation. Thus, the Supreme Court during the full century, when the Congress remained inactive in

regulating interstate commerce, was building up a great and sagacious system of regulation by a series of decisions which determined what the Nation might do and what the States might do. Of necessity, these decisions were a series of great *negations*, for the judicial department of the Government had no power to legislate *affirmatively*. All that it could do was to interpose the negation of its veto when either the Nation invaded the powers of the States or, more commonly, the States invaded the powers of the Nation. The power thus exercised was one of extraordinary difficulty and delicacy. It required this court to proceed with the very greatest caution from concrete case to concrete case lest it be accused by a usurpation of power of violating the very Constitution which it was sworn to defend.[3]

While nearly all the decisions had the disadvantage of being negations, yet, of necessity, they at times resulted, so far as the declaration of governmental power was concerned, in great and far-reaching affirmations, one of which, said to be "no longer to be regarded as open to re-examination," (*Leisy* v. *Hardin*, 135 U. S. 100, 118), distinguished between cases in which the power of Congress is, and cases in which it is not, exclusive of any exercise of such power under authority of a State, even in the absence of exercise of the power by Congress; that is to say, a distinction

[3] Before the year 1840 the construction of this clause had been involved in but five cases submitted to the Supreme Court of the United States. In 1860 the number of cases in that court involving its construction had increased to 20; in 1870 the number was 30; by 1880 the number had increased to 77; in 1890 it was 148; while at the present time it is probably not less than 500.

between "*matters national*" and "*matters of local interest.*" (*Gilman* v. *Philadelphia*, 3 Wall. 713 (Dec., 1865).) Compare statement in *Bowman* v. *Chicago & Northwestern Ry. Co.* (125 U. S. 465, 483, (March, 1888)), of question as one to be "considered in each case as it arises."

More fully stated the distinction is that the power of Congress is exclusive in matters that are "in their nature national or admit only of one uniform system or plan of regulation." (*Cooley* v. *Port Wardens*, 12 How. 299, 319 (Dec. T. 1851).)

As to the evils alleged to result from "conflicting regulations of different States," and as to the desirability of "uniformity of regulation," see *Hall* v. *De Cuir* (95 U. S. 485, (January, 1878)); *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 (April, 1885); *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489 (March, 1887); *Bowman* v. *Chicago & Northwestern Ry. Co.* (125 U. S. 465, 486 (March, 1888)).

Thus, the Supreme Court laid down the distinction in making practicable this concurrent power of State and Nation, that wherever the regulation of commerce was of a local character and referred to a subject matter as to which local laws did not affect the commercial harmony of the Nation that the States could act, subject, however, to the power of Congress, if it saw fit, to abrogate such local regulations, and the corollary to this rule was that whenever the regulation of commerce under consideration was one as to which the public interests required a

uniform rule throughout the Nation then the States had no power to legislate even primarily and the absence of any declaration by Congress was equivalent to an affirmative declaration by that body that no such restrictions should be made.

Thus, the Supreme Court firmly established the rule that for many purposes the power over commerce, whether interstate or intrastate, was concurrent, with the Congress as the paramount authority, and that for many other purposes the States were without authority and the power of the Federal Government was exclusive and supreme, even when the Congress itself had not acted.

This court has always recognized that, as human society became more concentrated and complicated, all powers, Federal and State, have a necessary reaction upon each other. With or without political institutions, steam and electricity have woven the commercial intercourse of the country into substantial unity, and this unity is therefore an indivisible unity. Therefore, it was futile for the political government in solving many practical problems to attempt to make any division. All that the Federal Government could do, as this court wisely declared, was to recognize as a broad principle that whenever the public necessity required that the States should exercise no power whatever, because of its direct and substantial effect upon the current of interstate commerce, the States were powerless, but that in all matters where the effect upon interstate commerce was indirect or insubstantial or where it related to a subject

matter as to which a uniform rule was not required for the common good, the States could legislate as to intrastate commerce, subject to the power of Congress to determine otherwise when in its judgment the interests of interstate commerce required a uniform rule.

While this evolution of the Federal power was in progress great changes were taking place in human society, due to the revolutionary results of the utilization of steam power, electricity, and, later, petroleum. The Nation had ceased to be a congeries of little local unities. It had become inextricably interwoven by steel and copper. The local road no longer sufficed to meet the commercial necessities of the Nation. A vast empire to the west of the Alleghenies had been slowly developed. The Civil War had shown the necessity for great corporate instrumentalities which could build roads, not of a few hundred miles, but of many thousands of miles.

The reaction upon our political institutions was necessarily very profound. The conception of commerce and of its unity became one of which the framers of the Constitution only vaguely dreamed. Slowly it was realized that the prosperity of America depended upon the harvesting machine and the locomotive. The pressure of population in the East, accentuated by the discovery of gold in California, largely delocalized the railroad as a corporate instrumentality. The Government itself entered upon a period of railroad building which has made of America the greatest transportation nation of the world,

and without which its present growth and dominant power in the councils of civilization would have been impossible. It chartered great railroad corporations, granting to one, the Union Pacific, an area in land alone greater than the State of New York and with a financial subvention of $16,000 per mile upon level ground, of $32,000 per mile in the hill country, and $48,000 per mile in the mountains. From 1850 to 1871 the Congress voted to railroads an area of land five times as great as that of the State of Pennsylvania, and thus recognized that America could not grow without a Nation-wide commerce and that the essential instrumentality thereof was a subsidized governmental road.

Unfortunately, the regulation of these roads was still left in private hands, as regulated by State laws, and the Congress awoke all too slowly to the necessity of Federal regulation.

The fact is that our Nation followed very tardily behind England, where the railroads had passed through three stages: First, small localized lines; second, consolidation into larger carriers, and, finally, governmental regulation of the three great systems into which English transportation was divided. In this country the necessity for such consolidation of small units into larger units was far greater than in England, although it progressed much more slowly, but gradually the great transcontinental railroads were created; not, however, without many black chapters in our history. These corporations in many cases became greater than the States which created

them, and their responsible managements exercised an altogether unhealthy power.

Those were the days of the Drews, and Jay Goulds, and the railroad wreckers of that class. The evils of such selfish management became intolerable. By unfair and oppressive methods one man was destroyed and another enriched beyond the dream of avarice. One city waxed great and the other waned. Whole sections—as, for example, the farming interests in the East—found themselves paralyzed as by a creeping paralysis, as freight was hauled from the wheat belt of Dakota to London cheaper than was possible for the farmer who tilled the ground only a few miles from the Atlantic seaboard. It became perfectly obvious that unless the evils of private ownership could be abated these great railroad corporations, which were no longer local, but of nation-wide power and influence, would not only go far to destroy the power of the States, not merely by corruption but by the power which they exercised over the property and prosperity of the citizen, but they would even constitute a serious menace to the Nation itself.

It was at that time that this court rendered the first of its great decisions with respect to the nature of railroad corporations when, in 1877, it decided the Granger Cases and the case of *Munn* v. *Illinois*. They stripped the railroad of its supposed private character, and stamped it as a semi-governmental instrumentality by holding, to use the legal phrase, that it was "impressed with a public use." A full century

after the Constitution was adopted Congress, yielding not merely to the so-called granger movement but to the widespread desire of citizens of all classes, passed the first interstate commerce law; and from that time to the passage of the Transportation Act legislation has been a series of advancing steps whereby Congress, in behalf of the whole Nation, seeks to end the abuses of transportation and to regulate the commerce of the Nation.

I do not say interstate commerce alone, for commerce had by this time become, through the development of mechanical power and through the growth of great nation-wide corporations, so indivisible for many purposes that it was impossible to divide it into water-tight compartments. To legislate with reference to interstate commerce without assuming an incidental but necessary control over intrastate commerce, had become impracticable with the progress of human society.

All the concrete cases to which I have already referred in this brief (*ante*, pp. 28-30) show a recognition by this court that while in the mere matter of geography there is still possible a distinction between interstate termini and intrastate termini, yet, in dealing with the instrumentality of commerce, namely, the corporation, and all that it utilizes to make transportation possible, an attempt to allocate any of the functions of any such instrumentality as credit, construction, operation, income, expenditures, to interstate and domestic commerce is a practical impossibility.

It may be that this court has never in one comprehensive phrase thus voiced this incontestible truth. It is the synthetic result of all these decisions. Pursuant to its conservative course, it prefers to decide concrete cases as they arise; but the cases hereinbefore referred to, when considered in the light of the principle which they involve, are based upon the essential unity of the business of transportation, or, at least, the essential unity of the corporate instrumentalities which make such transportation possible. This court has recognized in many cases (*ante* pp. 28–30) as a concrete proposition that Congress has full and plenary power to regulate interstate carriers as instrumentalities of commerce and that this power can not be lessened or hampered or obstructed by the consideration that, of necessity, these interstate carriers are likewise engaged in intrastate business, and that intrastate business is necessarily affected. If the duality of interstate and intrastate commerce be longer a fact, then they are as the Siamese twins, two bodies and yet united by a common ligature. I am not contending for any new doctrine; all I have said is the synthetic result of many decisions of this court in the last half century.

This court has recognized that interstate and intrastate commerce are, for many purposes, so interwoven that their division is impracticable. Thus, in *Baltimore & Ohio Railway Co.* v. *Interstate Commerce Commission* (221 U. S. 612), this court said (p. 618):

> But the argument, undoubtedly, involves the consideration that the interstate and intra-

state operations of interstate carriers *are so interwoven that it is utterly impracticable for them to divide their employees in such manner that the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively.* And thus, many employes who have to do with the movement of trains in interstate transportation are, by virtue of practical necessity, also employed in intrastate transportation.

This consideration, however, lends no support to the contention that the statute is invalid. For there can not be denied to Congress the effective exercise of its constitutional authority. By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce and of those who are employed in transporting them.

The most notable expression, however, of the indivisibility of commerce for many practical purposes is that suggested in the *Minnesota Rate cases* (230 U. S. 352), where this court said (pp. 432, 433):

But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. *If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to*

their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon.

X.

The concrete question.

The real question, therefore, is whether, with respect to the abandonment of a track, interstate and intrastate commerce are so interwoven that the power over the road as an interstate carrier must exclude the interference of the power of the State over intrastate commerce so far as the extension or abandonment of such line of railway is concerned.

I have already shown that this is the fact in the practical problem before the court. It would be idle for the Eastern Railway Company of Texas to abandon its only source of revenue, if its only authority to do so were limited to one portion of it, for its expenses would not be sensibly diminished by such restriction, and its revenues would be cut down one-fourth.

It was, however, suggested in the oral argument that the power of the State to defeat the purposes of the act by withholding its consent to the abandonment of the intrastate business of a carrier is unim-

portant, in view of the fact that the State could not compel such carrier to continue its operations at a loss.

As already suggested, the answer to this suggestion seems to be that this section is just as applicable to a profitable road as to an unprofitable road. Let us imagine, for example, that the Eastern Railway of Texas was making money on this portion of its tracks, but that the same service could be rendered by another line of tracks at reduced expense to the owner of both. It then desired to abandon one of the two useless lines of tracks, although each was, in itself, profitable. If the interpretation of the State of Texas be correct, then it could not abandon the line of tracks in question as to intrastate traffic without getting the consent of the State, and, as the road was profitable, it could not plead its unprofitable character as a legal defense against the State's claim that it must continue the operation. In such event, the railroad could not abandon the line of track without getting the consent of both the Federal and the State Governments, and it was this evil of conflicting regulations that the act intended to avoid.

How could this truth be more strikingly illustrated than by the instant case? The State of Texas does not challenge the right of the Federal Government to authorize the Eastern Texas Railway Company to abandon its interstate business. It, however, claims that it is for the State of Texas to determine whether the carrier shall abandon its intrastate business.

As a legal abstraction this may be possible, but as a practical problem it is impossible. The laws are made to serve the practical ends of human society. If the railroad can not make enough money to continue its operations, with combined interstate and intrastate fares, quite obviously it can not escape the sheriff's hammer or the bankruptcy court if it have only intrastate traffic as a source of revenue. The facts show that if it is to continue it must have, for the safety of human life, $200,000 for the improvement of its road. Its net income has shrunk to the vanishing point. Its operations have resulted for three years in a deficit. How, then, will it obtain the necessary money to improve its road, or even to pay its labor? If it gets it from its interstate business or from its business in other States, there is at once created by the veto of the State of Texas upon abandonment a burden and an incapacity in the instrument of interstate commerce, which constitutes a regulation of it by the State in a very substantial sense.

The practical operations of political government must conform to economic laws. The Government is made for man and not man for the Government, and thus there can be no practical regulation of this interstate carrier as a duality. It must either continue its operations as a unit, or it must abandon them as a unit; and the impossibility of dividing the indivisible is thus well illustrated.

I affirm, therefore, that, under the commerce power, the Congress authorized the Interstate Commerce Com-

mission with respect to interstate carriers to extend their roads or to abandon them, as the public necessities of commerce might require; that this or any regulation of an interstate carrier carries with it the power to deal with it as a financial, mechanical, and corporate unit without respect to the fact that its operations are also, in part, intrastate. If it be not so, the Federal Government has not the full power which the framers of the Constitution intended to grant when they said, without reservation: "The Congress shall have power to regulate commerce * * * among the several States." Indeed, if it be not so, the Nation has returned to the period of conflicting commercial relations, which the Constitution was intended to end forever.

XI.

The war power.

This plenary power of regulation not only flows from the commerce clause of the Constitution, but, having in mind the power under which these railroads were taken by the Federal Government, their return to their owners, and the conditions of such return is a legitimate exercise of the war power.

During the World War the Government, under its broad power to make war, took control of all the railroads of the country, *including the Eastern Railroad of Texas.* It did this under an obligation to return those roads in the same good order and condition in which it had taken them, and

it further agreed to compensate the owners of the railroads for the temporary loss of their property. The Government thereupon assumed full power over these railroads' properties to the same force and effect as if they were a branch of the Post Office Department or any other purely governmental instrumentality. They entered into contracts with such owning corporations as were willing to execute them to pay a standard return based upon the average of their net earnings, respectively, during the three years prior; and as to those railroads which refused to enter into such contracts the Government agreed, and under the Constitution was obligated, to pay to the owners of the railroads such fair return as was required by the Constitution when property is taken for a public use.

The Government found the railroads in a deplorable condition. They had been subjected not merely to double but quadruple regulation by governmental and nongovernmental powers. The Government of the United States since 1887 had tried to regulate them by affirmative legislation. The States continued to regulate them so far as this court in enforcing the Constitution permitted them to do so. The great railroad labor organizations regulated the largest part of their expenditures by compelling them to increase wages, until these wages had been increased far more than the entire amount of the net revenues of the railroads in the year before the war. The great banking institutions, which were the sources

of credit, regulated the railroads by prescribing the conditions upon which they could obtain money to build extensions or operate the railroads.

The fact is that the railroads had been regulated almost to their destruction. They no longer controlled either their income, for rates were fixed by both States and Nation, or their outgo, which was determined very largely by the rates of interest which bankers imposed and by the wages which labor organizations demanded.

The whole system, as an efficient transportation system, had broken down. If transportation is the backbone of the Nation that backbone was broken. Many railroads were in the hands of receivers, and many more were headed toward the same graveyard. Everywhere was shortage of cars, equipment, and material.

Shortly before the war, Mr. James J. Hill, the sagacious railroad manager, had estimated that the railroads to be put into first-class condition required $5,000,000,000, and with these enormous requirements the sources of credit were dried up.

The Government took over the railroads in this shattered condition and proceeded to expend, as a measure of the war, nearly $1,500,000,000 upon the railroads. At one time, the director general ordered 100,000 cars and 2,000 locomotives. Railroads were consolidated, terminals were shared in common, equipment standardized, and finally, at infinite cost, the American railroads became as important an aux-

iliary in the world's greatest war as the British fleet itself.[4]

The war had ended, and it was obvious that if the railroads were now returned to their owners without adequate protection many of them would immediately be thrown into bankruptcy and the shrinkage of values on $20,000,000,000 of securities held by private investors would be so immediate and widespread that a panic of colossal proportions would sweep the country. The railroads could not possibly repay to the United States the vast sums which they owed the United States for betterments and withheld revenues, and, on the other hand, the railroads had made vast unliquidated claims against the Government for damages to their roads during the period of governmental operation.

The Transportation Act was passed to meet this difficulty and to avert this crisis. It was passed when the railroads were still under governmental control. If ever there was an emergency this was one, for if the problem could not be solved then there would have been a financial crash which would have done infinite injury to intrastate as well as interstate commerce.

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[4] At one time, in February, 1918, Great Britain, France, and Italy made official representations to our Government that unless food deliveries could be promptly made the war was lost. Our Government made a supreme effort, and within a month supplies had been transported so rapidly that over 6,000 carloads of food congested the docks of the Atlantic liners and were vainly awaiting transportation. The war was won by many contributing causes, and not the least of these was the American railroad, which was utilized as a war power quite as much as the 3,000,000 men who were transported over its pathways of steel to reach the battle line in France.

Let me summarize the situation as condensed from statistics on file with the Interstate Commerce Commission:

1. Net railway operating income is what is left of railway operating revenues after deducting railway operating expenses and taxes, *but before making any allowance for either interest or dividends.*

2. During the test period of three years ending June 30, 1917, the net railway operating income of Class I carriers was $906,524,492 annually on the average. During the calendar year 1917—the last before Federal control—the net railway operating income for these carriers was $974,778,937. During the calendar years 1918 and 1919, the net railway operating income for these carriers amounted to $604,700,630 annually on the average for the two years.

3. During the calendar year 1920 (two months of which were during Federal control and ten months private operation) the net railway operating income amounted to $62,264,421. The steady decreases in the net railway operating income of Class I carriers, at least prior to 1920, were due not to any decline in gross revenues, which increased each year of the period under review, but solely to the unprecedented increase in railway operating expenses.

4. During the year from March 1, 1920 (the date when the Transportation Act took effect) to February 28, 1921, the first full year of private operation after the roads were returned to their owners, their net

railway operating income amounted to $2,090,975, a loss from the standard returns of over $972,000,000.

5. The annual interest (not, of course, including dividends) due on outstanding bonds by these carriers aggregated approximately $475,000,000.

6. For the year 1916—the year before January 1, 1917, at which date the Government took charge of wage questions under the Adamson Act—the labor costs of these carriers amounted to an aggregate of $1,468,576,394. From that time until July, 1920, the labor costs of these carriers were from time to time increased by Government action until such labor costs were for the year 1920 $3,698,216,351, and, if the same scale of wages had been in effect for the entire 12 months of that year instead of only eight, the labor costs would have been $3,912,992,219—an increase since the Adamson Act of approximately $2,444,000,000 annually in the labor costs.

7. At the beginning of Federal control approximately 44 per cent of the rolling stock of these carriers was on home lines and subjected to home standards of care. At the end of Federal control 78.1 per cent of this rolling stock was on foreign lines, scattered there bythe Government and deprived of home standards of care. The effect of this is shown by the fact that now when a normal quantity of this equipment has been returned to home lines it is found that approximately 374,000 cars are in bad order as against a normal of bad-order cars of not more than 160,000.

8. It is claimed by the railroad carriers that the roadway and track of the railroads were not properly maintained by the Government during Federal control but were returned to the carriers in much worse physical condition than when taken over by the Government. This undermaintenance was claimed to be due to a variety of factors, principal among which were the character of labor available under the pressure of war conditions; inability to secure sufficient supplies of steel, lumber, and other maintenance-of-way material in competition with the war industries; and the impracticability of carrying on normal maintenance work under the grievous pressure of heavy traffic forced upon the railways by the exigencies of the war.

The conditions that called forth the Transportation Act are admirably stated by Senator Cummins, as chairman of the Interstate Commerce Committee of the Senate; and, as I have appended a copy of this report to this brief as an appendix, I need not state with further details what the conditions were that called forth the legislation or what was the motive that caused Congress to pass this beneficent piece of legislation.

It is enough to say that the Government, apart from its power under the commerce clause, owes to these corporate instrumentalities of commerce a direct obligation, due to the fact that they were taken by the Government for public use, and all the obligations that arise under that public use must be met by the power under which they were taken over, the war power.

This power was assumed not merely to carry on the war, but at the present time the Government, because it utilized the railroads to carry on the war, has become a creditor to the extent of many millions of dollars of the corporate instrumentalities which it operated. It has the power, like any other lien creditor, before it releases the property, to which it must look as security for the amounts due it, to see that that property is not sacrificed by undue regulation.

The Government's claim rises higher than that of a mere creditor. Under the Transportation Act it has guaranteed for a period of six months the standard return to the railroads as measured by prewar experience, and it has further directed the commission, in order to rehabilitate the railroads, that it shall authorize rates that will enable the railroads to secure for a period of years an adequate return upon their investment.

The statute is too comprehensive for adequate summary, but its principal provisions are as follows:

This act (1) deals with problems arising out of the termination of Federal control of railroads, including a six months' guaranty of the incomes of railroads and express companies and a provision for the making of new loans by the Government to the railroads; (2) provides for the creation of boards for the adjustment of disputes between railroad employees and the railroads; and (3) amends the interstate commerce act in a number of respects.

Its main purpose was to protect and aid the vital function of transportation and to that end the carriers and to secure the peaceful adjustment of disputes between the railroads and their employees. It made a temporary guaranty of incomes to the railroad and express companies and gave very important directions to the commission for the purpose of better assuring to the railroads adequate revenues, and in some cases more than adequate revenues, thereafter. It facilitated the consolidation of railroads and express companies and the pooling of the earnings or traffic of railroads. It gave directions for the joint use of facilities and the establishment of joint rates. After providing that a railroad might not extend or abandon its line or any portion thereof, or issue securities, without the authorization of the commission, it went further and provided that no other authorization should be necessary: These clauses of the act protected the railroads against unnecessary competition and against the requirement of unnecessary services, regardless of State authorities, and probably regardless of any contracts into which the railroad might have entered. And the act protected the interstate business more fully than theretofore by giving to the commission more complete authority to revise any charge or practice which gives any undue or unreasonable advantage to intrastate transportation as against interstate transportation.

In the labor sections of the Transportation Act Congress sought to secure the adjustment of labor

disputes by negotiation rather than by industrial warfare and by the establishment of a board which should consider the disputes and state its conclusions.

Congress sought to build up the carriers, to harmonize their relations with each other and with their employees, and to discourage useless or unfair competition between carriers or between interstate and intrastate rates.

Observe that Congress made a departure in legislating as to *interstate carriers* instead of simply regulating the interstate transportation of carriers. It dealt with some matters as to interstate carriers which had theretofore been left to the States. This applies not only to the provisions as to extensions, abandonments, and securities and the encouragement of cooperation and consolidation as contrasted with competition, but also to the provisions which apparently direct that carriers be allowed to earn an adequate return from their business as a whole upon their property devoted to transportation as a whole (and not merely an adequate income from their interstate business based upon that portion of their property assignable for purposes of computation to interstate transportation), and it applies to the other provisions which enlarge the power of the commission over intrastate rates and to those provisions which deal with labor disputes. Moreover, Congress authorizes the commission to group railroads and "to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and

which are indispensable to the communities to which they render the service of transportation," although it thereby enables "some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation."

The amendments to the interstate commerce act (secs. 402, 405) which are an essential part of this policy of rehabilitation, provide for orders by the commission requiring the interchange of traffic by carriers and the joint use of terminal facilities; (sec. 402) provide that no railroad company subject to the act may extend its railroad or acquire or operate any line of railroad or extension thereof without securing from the commission a certificate of necessity, and that a railroad subject to the act may abandon all or any portion of its line or the operation thereof upon securing from the commission a certificate that public convenience and necessity permit the abandonment, and that the railroad may extend or abandon operations upon securing the approval of the commission thereto without securing approval other than such certificate; (sec. 407) declare that the commission may authorize carriers to pool earnings or traffic; (sec. 407) authorize the commission to adopt a plan for the consolidation of the railroad companies of the continental United States into a limited number of systems and authorize carriers by railroad to consolidate their properties in harmony with that plan; (sec. 407) authorize the commission to approve the

consolidation of four express companies into one company; (sec. 416) authorize the commission to revise any charge or practice which causes any undue or unreasonable advantage to accrue to persons or localities interested in intrastate transportation as against interstate transportation; (sec. 418) authorize the commission to prescribe reasonable maximum or minimum or maximum and minimum rates for individual or joint transportation and to declare what individual or joint classification, regulation, or practice should be observed thereafter, and to establish joint rates and charges, the act setting forth principles to be observed in fixing joint rates; (sec. 422) direct the commission to so adjust rates as to allow to the railroads a fair return upon the aggregate value of their property as the value of that property shall be determined by the commission, and as that value shall be entitled to consideration for rate-making purposes, the statute fixing temporarily the percentage which shall be considered a fair return and directing that, inasmuch as it is impossible to fix rates which will adequately sustain all the carriers which are indispensable to the communities to which they render service without enabling some carriers to receive a net railway operating income substantially in excess of a fair return upon the value of the property used in the service of transportation, such excess is to be paid to the United States, to be held for two purposes—one-half to be used as a reserve fund for such carrier, and after a certain point has been

reached, the remainder to be usable by the carrier for any lawful purpose, the other half to be held by the commission for a general railroad contingent fund, to be used in making loans to carriers or in purchasing equipment or facilities and leasing the same to carriers; (sec. 439) forbid railroads which are subject to the act to issue securities, even though permitted by the authority creating the carrier corporation, without the authorization of the Interstate Commerce Commission, and allow their issue upon such authorization without the securing of approval from any other source.

XII.

Conclusion.

If, during such period of rehabilitation, the Congress provides that a railroad should not increase its obligations by extending its lines, or, on the other hand, should not lessen the value of the security by abandoning its road, or should not increase the guaranty of the Government by running the road at a loss, why is not such an exercise of power the exercise of the war power and as such an appropriate means to discharge the important duty of rehabilitating the railroads, which suffered such grievous injury during the period of governmental control?

Conceding the power, the means of its execution are in the exclusive discretion of Congress. As Chief Justice Marshall well said, in the great case of *McCulloch* v. *Maryland* (4 Wheat. 316, 420):

> Let the end be legitimate, let it be within the scope of the Constitution, and all means

which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional.

Alleged contract rights, whether charter obligations or otherwise, are likewise of no avail. (*Knox* v. *Lee*, 12 Wall. 457, 550, 551; *Chicago, B. & Q. R. Co.* v. *McGuire*, 219 U. S. 549, 567; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm.*, 221 U. S. 612, 619; *Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 467, 482; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Second Employers' Liability Cases*, 223 U. S. 1, 52; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 350; *Atlantic Coast Line R. Co.* v. *Riverside Mills*, 219 U. S. 186, 202.)

If Congress has power to provide adequate transportation for interstate commerce and to that end may protect the credit of the carriers by supervising and regulating the issue of their securities and the expenditure of the capital funds, why may it not for the same purpose prevent unwise expenditures for unnecessary extensions and the absorption of their means and the destruction of their credit through the continued operation of unnecessary lines? The power to regulate presupposes the existence of the thing to be regulated and would be void without the power to "foster" and "protect" it. If a State may prevent an abandonment of a line within its borders which is in the opinion of Congress sapping the resources of an instrumentality of commerce, or is reducing its capacity and usefulness, the State

may impair or destroy this instrumentality of interstate commerce and thus destroy interstate commerce itself. If the State can decide a question so substantially affecting interstate commerce, its judgment is substituted for that of the Nation and becomes dominant in the national field of regulation.

I can not leave this important subject without emphasizing a conception of transportation, which has been in recent years largely lost sight of, although in the earlier history of the development of the railroad it profoundly influenced the legislatures of both State and Nation.

Watt's revolutionary discovery of the motive power of steam gave rise to a new social power of immeasurable proportions. The States, sovereign though they are, soon found themselves unable fully to cope with the tremendous power of interstate carriers, and could well understand the surprise of those mediaeval rulers who first organized their lands into feudal holdings as a means of protection, but lived to see the development of great feudal barons, who were stronger than the Crown itself.

Before the Federal Government undertook, a full century after the adoption of the Constitution, the regulation of the interstate railways, the States had realized that the masters of transportation could wield an influence like that of the greatest Warwick or Montfort in feudal times. As long as the railroad carriers, which had far outgrown the territorial boundaries of the States, were left free from Federal regulation, and were thus treated as private instru-

mentalities, the abuses of such unregulated private ownership did constitute a menace to both State and Nation, even though the beneficence of their operations, in developing the American commonwealth, is beyond measurement in words.

As previously stated (*ante*, p. 48), the Supreme Court ended forever this conception of an unregulated private ownership, when it held in *The Granger Cases*, decided in 1877, that the railroads were, in no true sense of the word, private, but were, on the contrary, semi-governmental agencies.

This great declaration by this court in a sense was a new "Declaration of Independence"; for it meant an emancipation from a seemingly all-powerful economic force, which was regulating interstate commerce by enriching one man, city, section, and State and impoverishing another. In this new Declaration of Independence, which was one of the epoch-making decisions of this court, it declared no new doctrine, but simply reverted to the primary conception of the railroad as a public highway.

Since the days of the Roman Empire, the establishment of public highways has been a recognized function of government, and when, therefore, the government—whether Federal or State—grants a franchise to construct a railroad, it simply delegates to the owners of the franchise the privilege, as an instrumentality of the government, to build a public highway. Such public highway does not differ in principle from any turnpike road, ferry, or bridge; and this was recognized in *The Granger Cases, supra.*

Indeed, the railroads could never have been originally built unless they had been vested with governmental powers to take property by the right of eminent domain. Such right can never exist save when it is exercised for a governmental or a semi-governmental purpose. Ordinarily, the right of a man to sell or refuse to sell his property can not be denied him consistently with the spirit of freedom; but when the purpose for which his property is taken by a superior power is for the common good, then his right to retain his property is subordinated to the great purposes of government. He yields it to the common interest subject to his right of just compensation. The construction of the railroads was only made possible by a recognition of the principle that while the duty and function of constructing highways was primarily that of the government, yet, when it delegated such power to a citizen or a corporation, the builders of these improved highways of steel rails were entitled to the right of eminent domain, because they were discharging the function of the government itself.

It is true that the conception of railroads as public highways was, by reason of mechanical necessities, somewhat restricted and differentiated from the ordinary highway in which all men could freely move; but the very principle which compels a carrier to transport and at reasonable rates and without discrimination presupposes the conception that the railroad is not private property, but is a public highway.

This court very early sustained this view in the case of *Bonaparte v. Camden & Amboy R. Co.* (1 Baldwin, 205), in which it held that the former King of Spain could not refuse a passage through his lands to railroad tracks on the ground that this appropriation of his property was not for a public purpose.

If, therefore, the railroads are nothing but improved public highways, and, as such, when operated by private ownership, mere governmental instrumentalities, then it follows that some governmental power must regulate this exercise of a governmental function. Originally, these highways, as previously stated (*ante*, pp. 37–41), were purely local highways; but with the marvellous development of railroad transportation in this country, they became great interstate highways, and, as such, they are predominantly to-day. *Eighty-five per cent of all the transportation business of this country is interstate*, and only 15 per cent is wholly within a State. The railroads of the country are linked together, and are thus as much one system of national highways as the arterial system of the human body is an indivisible unit. A vein may be wholly in the space between the wrist and the elbow; and yet it is so indissolubly a part of the whole circulatory system that, if the veins of the wrist be gashed, the man may bleed to death.

Similarly, the railroad highway may be wholly within a State; but, as in the instant case, it may be so much a part of the entire circulatory system of transportation that 75 per cent of all its business

either flows beyond the borders of Texas or comes into the State from other States.

I had this in mind when, in my oral argument in the *New York Rate Case*, I ventured to say that it was idle longer to attempt to divide the indivisible. Undoubtedly, for purposes of determining whether a citizen is engaged in domestic or in interstate business, a line can be drawn between shipments within a State and shipments beyond the boundaries of a State, for in this case a single act is under consideration, and it is a mere matter of geography to determine whether the merchandise has moved within or without the State. From the angle of the shipper, therefore, the division between interstate and domestic commerce is still applicable; but when the health of the circulatory system of transportation is under consideration, then, as pointed out by Mr. Justice Hughes in the *Minnesota Rate Cases* (*ante*, p. 51), there is such an economic interblending that one vein of the arterial system can not be separated from the other veins of the body.

This was true before the Transportation Act was passed; but, as I said in my oral argument in the instant case, that the purpose of the Transportation Act was to regulate, financially and economically, interstate carriers, which of necessity regulated their intrastate operations; that it was necessary, in view of the grave emergency which confronted the Nation, to throw them, in a sense, into hotchpot, so that the strongest would help the weakest, and that all would be rehabilitated by the united strength of all.

aided by the credit, the funds, and the fostering power of the United States Government.

Amplifying my metaphor of the arterial system, the railroads have been and, to some extent, now are, suffering from arteriosclerosis, or a hardening of the arteries. The States are powerless to cure this evil. In fact, their attempts to do so only aggravate the malady. The instant case is a striking proof of this; for the power of the Federal Government to stop the bleeding vein of an unprofitable corporation is halted by the State of Texas, which offers no relief, but opposes only obstruction.

Only the Nation can apply an effectual cure, upon which its economic interests so vitally depend, and it can only do so in the precents emergency by treating the whole body and not a part thereof. If this be not so, the Nation, then, is still confronted by the very evil of conflicting regulations with respect to commerce which brought the Constitution into existence, and which it was supposed that the Constitution had forever ended.

James M. Beck,
Solicitor General.

Blackburn Esterline,
Assistant Solicitor General

Robert P. Reeder,
Attorney.

November, 1921.

APPENDIX.

Government Control of Railroads.

November 10, 1919.—Ordered to be printed.

Mr. Cummins, from the Committee on Interstate Commerce, submitted the following report [to accompany S. 3288]:

Within a few days after the organization of the Committee on Interstate Commerce for this session, a subcommittee was appointed to consider the hearings which had been heretofore held upon the railway situation with a view of framing a bill and presenting it to the full committee. The subcommittee held almost continuous sessions for many weeks, and on September 2 the chairman of the committee introduced S. 2906 as the result of the work of the subcommittee. It was referred to the full committee and constituted the report of the subcommittee. Since that time, the entire committee has been in session substantially every day, considering S. 2906. The committee concluded its deliberations on October 23, having adopted many amendments; and, thereupon, directed the chairman to introduce a new bill embodying the amendments which had been agreed upon, to have it referred to the Committee on Interstate Commerce, and immediately to report it favorably. This was done, and the present bill, S. 3288, is now on the calendar for disposition by the Senate.

The first thought which the committee desires to impress upon the Senate is the importance of an

early consideration of the measure and the establishment of a reasonably permanent status for our systems of transportation. It is unnecessary to enlarge upon the vital part which transportation plays in all the affairs of the country. The health, commerce, peace, prosperity, and growth of the United States are absolutely dependent upon adequate and constantly increasing facilities for transportation. Everybody understands that the existing condition is a temporary one; and, as we draw near the end of Government operation the demoralizing influences multiply. The conceded return of these properties to their owners, within a short time, necessarily destroys or at least seriously impairs the morale of the operating force and it becomes less and less efficient. A still greater difficulty lies in the fact that no plans can be made for future improvements in the way of additions and betterments, to meet the growing demands of an expanding commerce. Naturally and properly, the Railroad Administration is disinclined to make expenditures of this character involving the execution of a program which, to be effectual, must be consistent and continuous, and the railroad companies are manifestly incapable of either making or carrying out provisions for the enlargement of their facilities for transportation. The result is a practical suspension of work in this direction. There is no practical way in which the period of partial paralysis can be avoided or prevented; but it is obvious, even to the most casual observer, that the period should be shortened by the most diligent attention on the part of Congress. It is to be hoped, therefore, that the moment the German treaty is disposed of the Senate will take up this bill and devote itself, without interruption, to its consideration until

it adopts whatever legislation may seem necessary to meet the very grave situation which confronts the country.

Before entering upon a review of those parts of the bill which relate to future regulation of interstate carriers and which establish a permanent policy with respect to the relation between the Government and our systems of transportation, it may be both interesting and helpful to explain briefly the method adopted by the bill for the return of the railroads to their owners and for the settlement of the accounts between the Railroad Administration and the railway companies.

The bill repeals the act of March 21, 1918, commonly known as the Federal control act, continuing it only in so far as is required to close up all matters growing out of Federal control. The act takes effect at midnight on the last day of the month in which it becomes a law, and at that time the transfer of the properties in the possession of the Government is to occur. All rights and remedies, both of and against the Government, are preserved. Without commenting in detail upon what these rights are, it may be said that it will be many years before all the matters growing out of Federal control will be adjusted, for the disputes already developed are numerous enough to occupy the attention of the courts for a decade. All that this report will attempt to do, in that respect, is to present an estimate of the uncontroverted condition as it will probably be on the 1st of January, 1920. The estimate has been prepared and furnished to the committee by the financial or accounting department of the Railroad Administration; but, as Mr. Sherley, who compiled it, very well indicates, it is only an estimate, for

many things may happen before the end of the year to affect it, and the reports for a month or two in the past are not completely analyzed.

To understand fully the financial statement about to be made, it is necessary to refer to the Federal control act under which the Director General of Railroads has been operating about 230,000 miles of our 260,000 miles of railways. Whether the President took possession of all the railways under the act of August 29, 1916, at the beginning of the year 1918, is a subject of controversy into which the committee will not enter at this time. It is sufficient to say that the act of March 21, 1918 (Federal control act), authorized the President to relinquish at any time prior to July 1, 1918, "control of all or any part of any railroad or system of transportation." About July 1, the President exercised this power and relinquished a large number of the shorter lines, retaining, as already suggested, something like 230,000 miles which had been from the 1st day of January, 1918, and still are being operated by the Director General of Railroads.

The Federal control act empowered the President to agree with each carrier, whose property was taken over, for the payment of a maximum compensation equivalent to its average annual railway operating income for the three years ending June 30, 1917. Upon this basis the aggregate annual compensation for the use of the railways passing into the hands of the Government and retained until the present time is, in round numbers, $900,000,000. At various times since the passage of the act the President has entered into contracts with the several railway companies, adopting his maximum authority as the "standard return." With respect to the exact

number of contracts so made, the committee is not advised, but it has information to the effect that while in the main the larger systems are under contract there are yet quite two-thirds of the whole number of carriers whose property is being operated by the Government which have not signed what is known as the "standard contract." These companies may or may not sign in the future; and, if they do not, each of them will be entitled to recover from the Government the just compensation which the law may award. With regard to those carriers, very many in number, which claim that their properties were taken over on January 1, 1918, but which were formally relinquished prior to July 1, 1918, they may or may not be entitled to compensation; and they are mentioned only to say that they are not included in the statement of the existing financial relations between the Government and the transportation systems. The Director General has made contracts with some of these carriers, but the committee assumes such contracts have not been made under the authority to agree upon compensation but are merely traffic agreements of the general character that one common carrier may lawfully make with another.

According to the estimate of the Railroad Administration, the net operating income of the systems in the hands of the Government for the two years 1918 and 1919, will be $551,777,459 less than the compensation to which the carriers are entitled, computed as provided in the law and as prescribed in the standard contract; that is to say, when all accounts have been adjusted and paid the Government will have lost that amount in its two years of operation. It is the opinion of the committee, without reflecting in

any wise upon the Railroad Administration, that in the end the loss will be found to be much greater than the estimate submitted; but, however that may be, it must ultimately be paid from the Treasury of the United States.

As is well known, Congress has appropriated, in all, $1,250,000,000 for the use of the Railroad Administration. This sum, so far as the committee is advised, has been expended, or will be expended, for the purposes and under the conditions prescribed in the Federal control act.

Assuming that the Government's loss for the two years will be, in round numbers, $600,000,000, it is obvious that if the railways could pay on December 31 all that they owe the Government, $650,000,000 of the appropriation would be returned to the Treasury; but that will not be the situation, for it is entirely impossible for the railways to repay out of income the sums which have been advanced by the Government for additions and betterments—expenditures which are ordinarily charged to capital account. It will become necessary for the Government to pay the railways a large part of the compensation in order that the carriers may pay the interest upon their bonds and other fixed charges and make such distribution in the way of dividends as will prevent undue hardship among their stockholders. If the Government retains about $400,000,000 and applies that sum upon the amount due from the railways on account of additions and betterments, the Government would still carry about $525,000,000 of the additions and betterments. If, however, it shall carry for future payment all expenditures during the two years for additions and betterments, it must fund nearly $950,000,000 on that account

alone. If it is also to carry the amount of cash in the hands of carriers on January 1, 1918, taken over by the Government, and the balances in the hands of agents, the amount to be funded would be increased $383,000,000; making a total substantially of $1,300,000,000.

The bill before the Senate pursues a middle course with respect to funding the indebtedness due from the carriers to the Government which is thought to be just both to the public and the railways. Nearly three weeks ago the committee asked the Railroad Administration to furnish a statement applying the provisions of the bill to the settlement of accounts and showing just what the result would be; but, up to this time, the statement has not been received. As soon as it comes in, it will be laid before the Senate.

October 22 the Railroad Administration, through the Director of the Division of Finance, sent to the chairman of the committee a letter which presents the basis of the general conclusions above stated, and it is thought but fair to the committee, and to the administration as well, that it be published as a part of this report. It is as follows:

UNITED STATES RAILROAD ADMINISTRATION,
DIRECTOR GENERAL OF RAILROADS,
Washington, October 22, 1919.

Hon. A. B. CUMMINS,
United States Senate, Washington, D. C.

MY DEAR SENATOR CUMMINS: Pursuant to my promise of some time ago, and with apology for the necessary delay, I beg to give you below a statement showing, on the basis of the best estimate that we can make at this time, an approximation of the

amount that would be needed to defray operating deficit, the amount that the Railroad Administration will have temporarily tied up in various assets and the additional amount that will be required in order to aid in the liquidation of the affairs of the Railroad Administration.

You understand, of course, that the figures are necessarily tentative because the latest balance sheet of the Railroad Administration is for June 30, 1919, and necessarily the most careful estimates can not possibly disclose the precise facts as they would develop during the last six months, approximately one-half of which is still in the future.

The figures given are upon the assumption that disposition will be made in accordance with the terms of the standard contract. The other possible disposition suggested in amendments proposed to provide for funding a certain amount of the indebtedness of the railroads would naturally present the matter in a different aspect. I shall consider that further on.

In order to enable settlements with the railroad companies at December 31, 1919, it will necessitate the payment to them of approximately $326,541,893, arrived at as per the following table:

Accounts with the corporations immediately payable at December 31, 1919.

Due the Government:		
Demand loans		$53,078,186
Short term notes		75,553,167
Open account balances due Government	$220,053,510	
Less amount not now collectible	66,628,228	
		154,025,282
For additions and betterments, other than allocated equipment, financed from income		370,381,494
Allocated equipment financed under general equipment plan		200,000,000
For additions and betterments financed through open account due company		45,100,132
Total immediately payable to Government		$98,138,261

Due the corporations:	
Balance due on compensation	$855,395,851
Depreciation and retirements	304,179,281
Open account balances due corporations	61,505,022
Total immediately payable to corporations	1,221,080,154
Amount needed to be appropriated to enable the Railroad Administration to immediately pay to the corporations the net amount due them	326,541,893

When the Railroad Administration shall have made settlement with the railroad companies in accordance with the foregoing, the situation will be as follows: The Railroad Administration will have expended and there will, in consequence, have been correspondingly consumed or tied up

1. Amount necessary to defray operating deficit, the difference between the standard rental payable to the railroad companies and the estimated net operating income for the 24 months ended Dec. 31, 1919	$551,777,459
2. Amount of cash working capital necessary to leave temporarily with the corporations until the returns from the operation of their properties after Federal control become available	357,913,276
3. Amount of open account due Government by the corporations, representing payments by Government of corporate liabilities which the corporations can not repay at this time	65,628,228
4. Amount of additions and betterments' expenditures, including equipment, made to the railroad companies' properties during 1918 and 1919, which must be carried by the Railroad Administration for the time being	518,675,396
5. Improvements on inland waterways	14,341,886
6. Loans during 1918 and 1919 to railroad companies not immediately repayable	48,375,735
7. Boston & Maine reorganization	20,000,000
Total	1,576,541,893

Appropriations heretofore made and applicable to the foregoing aggregate $1,250,000,000, so that to discharge its obligations as they exist at December 31, 1919, on the basis of the standard contract, the Railroad Administration will need an additional appropriation, it is estimated at this time, of $326,541,893.

Concerning the proposal to fund the indebtedness of the railroad companies to the Railroad Administration, it will be noted from the foregoing that a settlement under the contract contemplates that there will have been retained in settlement with the companies, on account of additions and betterments to their properties, the sum of $415,481,626 and that it is contemplated that even with that deduction from the compensation that the Government, nevertheless, will be carrying $518,075,309 of additions and betterments which the companies are not able to repay at this time, so that if the whole amount of the indebtedness for additions and betterments should be funded the above appropriation would have to be increased by the amount of $415,481,626 and the Government would then be required to fund for additions and betterments the sum of $933,556,935.

Regarding the proposal of the corporations that the amount of the working capital taken over should also be funded, it is to be observed that at the beginning of Federal control the amount of cash in the hands of the treasurers, so taken over by the Railroad Administration, aggregated $239,190,605. In addition, the balances in the hands of agents and conductors aggregated $143,899,424.

If the proposal looks to the furnishing of these amounts in addition to amounts sufficient to pay off the liabilities of the Railroad Administration, that amount would have to be added to the requirements shown above. However, the fact is that the Railroad Administration used such cash and agents' and conductors' balances in liquidating the liabilities of the corporations in the earlier months of Federal control and it is to be assumed that a like process will take place at the end of Federal control.

If, therefore, the Railroad Administration leaves in the hands of the corporations a sufficient amount of working assets to liquidate its liabilities, not all of which must be paid simultaneously with the end of Federal control but which will be liquidated doubtless

spreading over a period of from 30 to 90 days (it is true that a considerable part of such liabilities must be met in the first 15 days following the return of the roads to private control and a sufficient amount of cash or other quick assets should be left with the corporations to protect them) it would be ample protection to the corporations in point of working capital and would practically duplicate the situation as it developed when Federal control intervened.

As stated above, the Railroad Administration used the cash assets of the corporations, generally, for the payment of the corporations' liabilities. To the extent that there is a balance in the hands of the Railroad Administration, resulting from such transactions, the statement showing the account with the companies on page 2 of this letter, contemplates that such amount will be paid over to the companies except to the extent that any such amounts may be properly applied to the repayment of the indebtedness of the companies to the Railroad Administration.

To the extent that such process resulted in the Railroad Administration paying corporate liabilities in excess of assets, the account on page 2 of this letter contemplates, moreover, the collection thereof from the corporations only in cases where it is practicable for such corporations to make payment thereof from balances of compensation due them.

On this theory, the foregoing indicates that the Government will be required to carry, for the time being, balances due from the corporations on open account aggregating $66,000,000.

With reference to the amount shown above for working capital temporarily tied up, it should be observed that a considerable part of the assets of the Railroad Administration are represented by items other than cash. For example: traffic balances, accounts receivable and various unadjusted items, both debit and credit, that are necessarily incident to a business of such magnitude and which can not finally be cleared up short of several months. The

amount shown represents the balance between such unsettled assets and unsettled liabilities—the net being the figure which is shown as the amount which the Government will temporarily have tied up as working capital.

If for any cause the plan for a general equipment trust should not be carried out, there will be needed a sum greater than has been set up. How much, it is now impossible to foretell. The general equipment trust plan contemplates a repayment to the Government of at least $200,000,000, which figure has been used in the foregoing statements. In the absence of a general equipment trust plan, some moneys could be immediately secured through equipment trusts of individual carriers. Perhaps something like $100,000,000 could be obtained in this regard. So that the figure given above, $326,541,893, might need to be increased by $100,000,000.

I think it is desirable that I again emphasize the fact that this statement, though made from a somewhat detailed examination of accounts with the respective carriers, of necessity can not be considered as final. The need to forecast events more than two months away of itself introduces elements unstable enough to make conclusions necessarily tentative only.

In addition to that, it should be stated that there are various matters that will only reach adjustment and a status sufficient to enable them to be stated in financial terms after presentation and determination of claims respectively by the Government and the railroads touching many items incident to Federal control. So that in particular the item set out in the foregoing statement under the designation of "Amount necessary to defray operating deficit, etc.," must be considered as subject to considerable change in amount because of the subsequent bringing into it of debits and credits which can not now be even approximated. I am sure that you will appreciate these facts, and I emphasize them simply

that a cursory statement of the figures therein submitted may not lead others to erroneous conclusions.

Very truly, yours,

SWAGAR SHERLEY,
Director Division of Finance.

(The statement applying the provisions of the bill to the settlement of accounts and showing just what the result would be, heretofore referred to as not having been submitted, was subsequently furnished and is here printed in full, as follows:)

UNITED STATES RAILROAD ADMINISTRATION,
DIRECTOR GENERAL OF RAILROADS,
DIVISION OF FINANCE,
Washington, November 10, 1919.

Swagar Sherley, director; Charles B. Eddy, associate director.

MY DEAR SENATOR CUMMINS:

I am inclosing you herewith the following statements:

Statement A, which purports to show the amount of capital expenditures (exclusive of the cost of allocated equipment) and other indebtednesses, that would be funded under the terms of Senate bill 3288.

Statement B, which purports to show the amount of capital expenditures (exclusive of allocated equipment) and other indebtednesses, that would be funded under the terms of the section originally submitted by the Division of Finance of the Railroad Administration permitting offsets in accordance with the provisions of the standard contract.

NOTE.—In order that Statement B may be better understood, the section originally submitted by the Division of Finance of the Railroad Administration permitting offsets in accordance with the provisions of the standard contract is printed as an appendix to this report.

Statement C, which purports to show the amount of capital expenditures (exclusive of the cost of allo-

cated equipment) and other indebtednesses, that would be funded under the terms of H. R. 10453 (the Esch bill).

Statement D, which purports to show the amount of capital expenditures on account of equipment purchased for the railroads and allocated to them, that is expected will be funded under the national equipment trust plan.

Statement E, which purports to show, in comparative columns, the effect of the refunding provisions in Senate bill 3288 (the Cummins bill), H. R. 10453 (the Esch bill), and amendment suggested by the Division of Finance of the Railroad Administration permitting offsets in accordance with the standard contract; the statement also shows the amount of moneys which will need to be voted by Congress in order to carry out any one of these plans.

The financial differences shown on these tables between the funding provisions in the House bill and those in the Senate bill are due to the fact that the House bill requires deductions to be made first against indebtednesses other than that which grows out of expenditures chargeable to capital account, whereas the table touching results of the provisions in the Senate bill are, as noted, predicated upon deductions of amounts due on capital account first, and only subsequently upon deductions on account of other indebtedness.

I trust that these will give you the information you desire. To the extent that these figures differ from those in my letter to you of October 22, 1919, it should be stated in explanation that it is due chiefly to the fact that the estimate then hurriedly made had to be the result, in a large measure, of treating as a whole the accounts of the various railroads, whereas the present statement is the result of an elaborate detailed study of the accounts of each of the Class I roads. It should be borne in mind, however, in connection with these statements, as in connection with the previous one, that a large part of the tables submitted are necessarily estimates, as they forecast

conditions to the end of the year and are predicated, even as to recent past months, upon estimates rather than upon the actual figures, which are not yet obtainable. They are, however, I believe, substantially accurate.

I regret that the intricacy of the problem, together with the illness of Mr. Parker, has delayed several days the supplying you with this information. I beg to remain,

Most sincerely,

SWAGAR SHERLEY,
Director Division of Finance.

Hon. A. B. CUMMINS,
United States Senate, Washington, D. C.

STATEMENT A.—*Amount of capital expenditures, exclusive of the cost of allocated equipment, together with other indebtedness due to the Government from the railroad companies, that would be funded under the terms of S. [illegible]*

Total cost of additions and betterments which could be funded, exclusive of allocated equipment	$773,551.00
Amount which may be deducted therefrom, being the amount due on account of compensation or open account after the payment to railroads of sums sufficient to take care of fixed charges and regular dividends and working capital to the extent that money due permits of it	221,823.00
Amount of capital expenditures, other than allocated equipment, fundable under terms of bill	551,728.00
Other indebtedness to be represented by demand notes	211,884.00
Long-term loans (N. Y., N. H. & H. R. R. and Boston & Maine)	68,375.00
Total indebtedness representing amounts funded and also amounts subject to payment on demand under the terms of the bill (exclusive of allocated equipment)	831,987.00

NOTE 1.—This table is built on the assumption that sums deductible from compensation and open account are applied, first, against capital expenditures rather than against indebtedness due on open account.

NOTE 2.—It is to be noted that this represents consolidation of estimates touching each of the roads, as to some of which there is money due them on open account, but as to most of which there is money due from them to the Government on open account.

NOTE 3.—This statement presumes the payment to the railroads of sums over and beyond their need for fixed charges and regular dividends of $321,815,000, as available for working capital. The estimated amount that would be needed by the railroads as working capital, if each road were given working capital on the basis of one month's operating expenses, would be approximately $353,000,000. The provisions of the bill provide, however, not that the roads shall be furnished with working capital, but only that deductions shall not be made from the sums to be funded unless working capital shall have been provided. The credits due the various railroads out of compensation and otherwise, after paying fixed charges, when worked out for the various roads, do not permit of additional payments in a sum greater than $321,815,000, which, therefore, is the amount of working capital that the roads would receive after compliance with the terms of the bill. This means that some roads would get a sum equal to a full month's operating expenses as working capital, whereas some roads would not receive any working capital under this plan, and this latter class would be those roads most in need of working capital.

STATEMENT B.—*Amount of capital expenditures, exclusive of the cost of allocated equipment, together with other indebtedness due to the Government from the railroad companies that would be funded under the terms of the section submitted by the Division of Finance of the Railroad Administration, permitting offsets in accordance with the provisions of the standard contract.*

Total cost of additions and betterments which could be funded, exclusive of allocated equipment	$775,551,000
Amount which may be deducted therefrom (being the amount due on account of compensation or open account after the payment to railroads of sums sufficient to take care of fixed charges and regular dividends)	415,016,000
Amount of capital expenditures, other than allocated equipment, fundable as permitted under the standard contract	360,535,000
Long-term loans (N. Y., N. H. & H. R. R. and Boston & Maine)	68,375,000
Other indebtedness, etc.	158,646,000
Total amounts to be funded (exclusive of allocated equipment)	587,556,000

It is to be noted that under the terms of the standard contract, in addition to the amount of $360,535,000 to be funded, there would be indebtedness of the railroads to the Government to be evidenced by demand notes of the sum of $158,646,000, indebtedness on account of long-term loans to the New York, New Haven & Hartford Railroad and the Boston & Maine Railroad and other companies of $68,375,000; or a total of funded and demand indebtedness of $587,556,000.

NOTE 1.—This table is built on the assumption that sums deductible from compensation and open account are applied, first, against capital expenditures rather than against indebtednesses due on open account.

NOTE 2.—It is to be noted that this represents consolidation of estimates touching each of the roads, as to some of which there is money due them on open account, but as to most of which there is money due from them to the Government on open account.

STATEMENT C.—*Amount of capital expenditures, exclusive of the cost of allocated equipment, together with other indebtedness due to the Government from the railroad companies, that would be funded under the terms of H. R. 10453.*

Total cost of additions and betterments which could be funded, exclusive of allocated equipment	$775,551,000
Amount which may be deducted therefrom (being the amount due on account of compensation or open account after the payment to railroads of sums sufficient to take care of fixed charges, regular dividends, and working capital to the extent that money due permits of it)	133,911,000
Amount of capital expenditures, other than allocated equipment, fundable as permitted under the standard contract	641,640,000
Long-term loans (including New York, New Haven & Hartford, and Boston & Maine)	68,375,000
Other indebtedness, etc	69,876,000
Total amounts to be funded, exclusive of allocated equipment	779,891,000

It is to be noted that under the terms of H. R. 10453, in addition to the amount of $641,640,000 to be funded, there would be indebtedness of the railroads to the Government to be evidenced by demand notes of the sum of $69,876,000; indebtedness on

account of long-term loans to the New York, New Haven & Hartford Railroad and Boston & Maine, and other companies, of $68,375,000; or a total of funded and demand indebtedness of $779,891,000.

NOTE 1. This table is built on the assumption that sums deductible from compensation and open account are applied, first, against indebtedness due on open account, rather than against capital expenditures.

NOTE 2. It is to be noted that this represents consolidation of estimates touching each of the roads, as to some of which there is money due them on open account, but as to most of which there is money due from them to the Government on open account.

NOTE 3. This statement presumes the payment to the railroads of sums over and beyond their need for fixed charges and regular dividends of $279,000,000, as available for working capital. The estimated amount that would be needed by the railroads as working capital, if each road were given working capital on the basis of one month's operating expenses, would be approximately $353,000,000. The provisions of the bill provide, however, not that the roads shall be furnished with working capital, but only that deductions shall not be made from the sums to be funded unless working capital shall have been provided. The credits due the various railroads out of compensation and otherwise, after paying fixed charges, when worked out for the various roads do not permit of additional payments in a sum greater than $279,000,000. This, therefore, is the amount of working capital that the roads would receive after compliance with the terms of the bill, which means that some roads would get a sum equal to a full month's operating expenses as working capital, whereas some roads would not receive any working capital under this plan, and this latter class would be those roads most in need of working capital.

Statement D.—*Amount of capital expenditures on account of equipment purchased for the railroads and allotted to them that it is expected will be funded under the national equipment-trust plan.*

Total cost of 100,000 cars and 1,930 locomotives	$372,000,000
Cash to be received through the sale of equipment-trust certificates to the public	200,000,000
Amount to be represented by equipment obligations held by the Government, secondary to those in the hands of the public, and to be payable in 15 installments	172,000,000

Note 1. This table is predicated upon the carrying out of the national equipment-trust plan, and represents what is believed to be a conservative statement as to the amount of cash immediately available from such plan. It is impossible at this time to state more definitely the amount to be carried of the cost of this equipment, due to the fact that something under 10 per cent of the cars purchased have not yet been finally accepted by the railroads.

Note 2. If the national equipment-trust plan should not be carried through, and separate equipment trusts should be created for the financing of the obligations of the respective roads, it is likely that the Government would realize immediately in cash about $100,000,000 instead of $200,000,000, and correspondingly carry over a 15-year period some $272,000,000 rather than $172,000,000, in which event the moneys needed to be appropriated, as set out in Table E, would have to be increased by approximately $100,000,000.

STATEMENT E.—*Comparison of amounts to be funded.*

[(1) Under the provisions of Senate bill No. 3288. (2) Under the provisions of H. R. 10453. (3) Under the provisions of the section originally submitted by the Division of Finance of the Railroad Administration permitting offsets in accordance with the provisions of the standard contract.]

Class I roads.	Senate bill No. 3288.	H. R. 10453.	Standard contract.
1. Total cost of additions and betterments (excluding allocated equipment)	$775,551,000	$775,551,000	$775,551,000
2. Amount that may be deducted therefrom account compensation or open account due company	223,823,000	133,911,000	415,016,000
3. Net amount of additions and betterments (excluding allocated equipment) to be funded	551,728,000	641,640,000	360,535,000
4. Open account due Government, to be evidenced by demand notes	158,884,000	16,876,000	105,646,000
5. Long-term loans (including N. Y., N. H. & H. R. R. and Boston & Maine)	68,375,000	68,375,000	68,375,000
OTHER PROPERTIES.			
6. Additions and betterments and open account due Government, to be funded	53,000,000	53,000,000	53,000,000
7. Total amount of funded and demand indebtedness (exclusive of allocated equipment)	831,987,000	779,891,000	587,556,000
OTHER REQUIREMENTS.			
8. Allocated equipment not covered by equipment trust	172,315,000	172,315,000	172,315,000
9. Additions and betterments inland waterways	11,342,000	11,342,000	11,342,000
10. Operating loss 24 months all properties (note)	646,777,000	646,777,000	646,777,000
11. Total requirements	1,665,151,000	1,613,355,000	1,421,030,000
12. Appropriations already made	1,250,000,000	1,250,000,000	1,250,000,000
13. Appropriations now required (note 1)	415,151,000	363,355,000	171,030,000

NOTE 1.—The foregoing estimate is predicated upon the conversion into cash of all assets of the Railroad Administration, other than those shown above as being carried. In point of fact, in dealing with figures as large as these and matters as complicated, it will necessarily follow that there will be a considerable amount of assets of the Government subsequently convertible into cash that can not be immediately realized, or even realized contemporaneously with the need of paying out on account of liabilities of the Government.

It is safe to estimate that this amount will be at least $200,000,000, so that, practically, to carry out the requirements under the Senate or House bill, or the substitute proposal in accordance with the existing standard contract, the Congress should appro-

priate a sum at least $200,000,000 in excess of that stated in item 13.

NOTE 2.—The operating loss shown above represents an estimate for the two years of Federal control of the amount by which the net operating income of the railroads fell short of the standard return, estimated amount of interest on accounts due from the Government to the railroad companies, and on accounts due from the railroad companies to the Government; and is predicated on the present basis of earnings, the latest available figures on an actual basis being for the month of August, 1919, so that for the last four months the figures are necessarily speculative.

The operating loss also includes an estimate of $95,000,000 on account of adjustment of materials and supplies, under provisions of the standard contract. It should be added that beyond these things there are various matters that will reach adjustment and a status sufficient to enable them to be stated in money only after presentation and determination of claims, respectively, by the Government and the railroads, touching many items incident to Federal control; so that in particular the item of operating loss must be considered as subject to considerable change in amount because of the subsequent bringing into it of debits and credits which can not now even be approximated.

APPENDIX.

The proposition submitted by the Division of Finance of the Railroad Administration permitting offsets in accordance with the provisions of the standard contract is as follows:

Any indebtedness of any carrier to the United States incurred for additions and betterments to roadway and structures, or betterments to equipment, made during Federal control and properly chargeable to capital account, which may exist at

the time Federal control is relinquished, and after applying against it such indebtedness of the United States to such carrier as is permitted under any contract now or hereafter made between such carrier and the United States, or, where no such contract exists, as would be permitted by the terms of the standard contract between the United States and the carriers relative to deductions from compensation (sec. 7, par. b, of the standard contract), shall be payable, at the request of the carrier, in 10 equal, annual installments, the first one at the expiration of one year after the termination of Federal control, and one at the end of each year thereafter until all are paid, with interest at the rate of 6 per cent per annum, payable semiannually: *Provided, however,* That any carrier obtaining the funding of such indebtedness as aforesaid shall give, in the discretion of the President, such security in such form and upon such terms as he may prescribe, to insure the faithful and punctual payment by it of the principal and interest under the funding arrangement herein above permitted. Any other indebtedness of any such carrier to the United States which may exist after the settlement of accounts between the United States and the carrier shall be evidenced by notes payable on demand, with interest at the rate of 6 per cent per annum, and secured by such collateral as the President may deem it advisable to require.

With respect to any bonds, notes, or other securities acquired under the provisions of this section or under the provisions of said act of March 21, 1918, the President shall have the right to make such arrangements for extension of the time of payment or for the exchange of any of them for other securities, or partly for cash and partly for securities, as may be provided for in any agreement entered into by him or as may in his judgment seem desirable.

The President shall have the right, at all reasonable times until the affairs of Federal control have been concluded, to inspect the property and records of all

carriers at any time under Federal control, whenever necessary or proper to protect the interests of the United States, or to supervise matters being handled for the United States by agents of the carriers, or to secure information concerning matters arising during Federal control, and the said carriers shall provide all reasonable facilities therefor.

Said carriers shall, upon the request of the President or those duly authorized by him, furnish all necessary and proper information and reports compiled from the records made or kept during the period of Federal control affecting their respective lines.

All powers invested in the President by this act, except those contained in section 7, may be executed by him through such officers, agents, or agencies as he may from time to time appoint.

All unexpended balances of money heretofore appropriated in the said act of March 21, 1918, or in the act of June 30, 1919, entitled "An act to supply a deficiency in the appropriation for carrying out the act entitled 'An act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,' approved March 21, 1918," are hereby reappropriated and made available until expended in the manner authorized in the said act of March 21, 1918, for the purpose therein and herein specified and of adjusting, settling, liquidating, and winding up all matters of whatsoever nature, including compensation, arising out of or incident to Federal control, and all moneys derived from the operation of the carriers, or otherwise arising out of Federal control, and all moneys that have been or may be received in payment of indebtedness of any carrier to the United States arising out of Federal control shall be and remain available until expended for the purposes aforesaid.

THE POLICY ESTABLISHED BY THE BILL FOR FUTURE CONTROL AND REGULATION.

Having made clear, as it is hoped, the terms upon which the railways are to be returned to their owners for private operation under public control and regulation, the committee advances to those parts of the bill which create the permanent system for such control and regulation. In considering this phase of the subject, it should be constantly borne in mind that if our policy is to be private operation of the instrumentalities of transportation there must be a large and constant inflow of capital. As commerce increases in volume, the facilities of transportation must increase; and, without reckoning the funds which must be secured to discharge maturing obligations already in existence, it will be conceded by everybody that immense sums will be required from year to year for new construction, additional equipment, and necessary improvement. The capital thus demanded must be drawn from those who have money to invest, and, of course, it must be voluntarily contributed. If the people who have money will not invest it in the transportation enterprise, private ownership and operation under public control must necessarily fail. It is apparent, therefore, that any legislation which may be proposed upon the hypothesis of private ownership and operation must tender to the future investor reasonable security for the investment he is asked to make and reasonable assurance of such yearly return upon his money as will induce him to enter the field. The better the security and the more certain the return, the less will be the rate required to attract the investment.

It is here that our present system of regulation has failed. Taking the railways as they are, with their widely varying conditions, both of construction and environment, it is wholly impossible for the Interstate Commerce Commission, no matter how wise and faithful its members may be, to prescribe schedules of charges for transportation that will be, at the same time, just to the public and that will maintain the railways which must continue to function if the people of the country are to be provided with adequate transportation. In a given competitive area the rates which will furnish one company a grossly excessive income will lead another into bankruptcy. The writer of this report is firmly convinced that when the Government assumed the operation of the railways they were, taken as a whole, earning all they should be permitted to earn; but, in the inevitable distribution of these earnings among the various railway companies, the railways which carried 30 per cent of the traffic were earning so little that they could not, by any economy or good management, sustain themselves. Nevertheless, it is unthinkable that these highways of commerce shall be abandoned, and some system must be devised not only for their continuance but for their betterment and growth. Government ownership would solve the problem, but it is the judgment of the committee that Government operation is attended with so many disadvantages—notably in the increased cost of operation—that this plan must be discarded. There is but one other solution. It is consolidation, and here two policies at once present themselves. The first, complete consolidation into one ownership; second, consolidation into comparatively few com-

petitive systems. The first has some advantages over the second, but it has some disadvantages, and the disadvantages outweigh, in the opinion of the committee, the advantages.

The superior efficiency of several systems need not be enumerated at length, but there is one consideration to which attention should be called: Competition, not in rates or charges but in service, will do more to strengthen and make public regulation successful than any other element which can be introduced into the business of transportation. Honorable rivalry among men is the most powerful stimulus known to human effort. For this reason, largely, the committee, recognizing the necessity for consolidation, determined in favor of the gradual unification of the railways into not less than 20 nor more than 35 systems; not regional or zone systems but systems that will preserve substantially existing channels of commerce and full competition in service. In the grouping of the railways into these systems another vital rule is to be observed, namely, that they are to be so divided that the operating incomes of the several consolidated companies will bear substantially the same relation to the value of their respective properties held for and used in transportation.

The procedure for bringing about the proposed consolidation may now be considered. The bill creates a transportation board, with large duties and powers, which will be more fully explained hereafter. It is mentioned now only because it is the governmental agency through which consolidation is to take place. Section 9 declares the policy of consolidation; prescribing that, as soon as practicable and in the manner provided for in the act, the railways of the

continental United States shall be divided in ownership and for operation into not less than 20 nor more than 35 separate and distinct systems, each of said systems to be owned and operated by a distinct corporation organized or reorganized under the act. Section 9 concludes:

In the aforesaid division of the said railways into such systems, competition shall be preserved as fully as possible, and wherever practicable the existing routes and channels of trade and commerce shall be maintained. The several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the value of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of the railway properties involved in the comparison.

Especial attention is directed to the sentence last quoted, for it expresses the object to be attained; and until it is attained rate regulation can not be fully equitable to both the public and the carriers.

Immediately upon its organization, the transportation board is to prepare and adopt a tentative plan for consolidation. The plan is to be submitted to a public hearing, at which it is assumed that all persons in interest will appear. After the hearings are concluded, a final plan is to be adopted and submitted to the Interstate Commerce Commission for its approval. This arrangement will make known to the whole country the consolidations which must eventually occur. Section 12 presents the authority for the reorganization of existing railway corporations, and all consolidations must be either through a reorganized railway corporation or one originally

organized under the terms of the act. It is to be noted, also, that if a partial and voluntary consolidation is carried into effect it must be in harmony with and in furtherance of the complete plan established by the board. Sections 21 and 22 provide for the original incorporation of railway companies; and, concerning this part of the bill, it need only be remarked that any such corporation must be organized "for a specific and defined purpose, namely, the ownership, maintenance, and operation of one of the railway systems or for the construction, ownership, maintenance, and operation of new lines or systems into which the railways of the United States are to be divided by the aforesaid board."

For the period of seven years after the act becomes a law, voluntary consolidations are authorized, under the strictest supervision by either the board or the commission. The distinctive feature of the voluntary as well as the involuntary consolidations is that the capitalization is not to exceed the actual value of the property held for or used in the transportation service. One of the chief causes leading to the public distrust of railway financing is the deep conviction on the part of the people that the present capitalization of many of the railways grossly exceeds the real value of the property which renders the service. When the Interstate Commerce Commission finishes the valuation in which it is engaged and when those values, as they are judicially determined and only those values, pass into the capitalization of the newly organized or reorganized corporations under this act, that serious obstacle in the way of effective regulation will have disappeared.

At the end of seven years after the passage of the act the compulsory consolidation begins. It is car-

ried out as provided in section 13. If, during the seven years, voluntary consolidation has accomplished the purpose, this section, of course, will not be operative; but, during the voluntary period, its presence in the law will be a compelling force which, in the judgment of the committee, will stimulate the present railway companies to carry forward the declared policy of Congress.

The full advantages of the proposed policy of consolidation can not be secured for 10 or 12 years. The railways must be returned to their owners at once. This situation makes it necessary to provide a plan for immediate relief that will tend, at least, to overcome the difficulties confronting us and render private operation possible.

The sums which are to be paid to the transportation board are to be placed in a general railroad contingent fund, which is to be used by the board, together with all its accretions, "in furtherance of the public interest in railway transportation," "in avoiding congestions, interruptions, or hindrances to the railway service of the United States," or "in furthering the public service rendered by them (carriers), either by way of purchase, lease, or rental of transportation equipment and facilities to be used by such carriers whenever the public interest may require, or by way of loans to such carriers, upon such fair and reasonable terms and conditions, in either case, as the board may prescribe."

THE TRANSPORTATION BOARD.

Section 7 creates a new public authority for the regulation of commerce. Its title is "Transportation Board." It is to be composed of five members, until the consolidation heretofore mentioned is complete

and, thereafter, of three members. It is unnecessary to recite the details of its organization, for the bill itself is clear and explicit.

The first duty of the board is to prepare and, after hearing, adopt the plan of consolidation, which has been already fully set forth. Its general powers with respect to transportation are stated in the latter part of section 10, and these include certain functions now exercised by the Interstate Commerce Commission, among which may be mentioned the following: (*a*) The administration of the car service act; (*b*) of the safety appliance acts; (*c*) of the hours of service act; (*d*) of the locomotive boiler inspection act; and others of like character. It is also charged with a series of important duties relating to water transportation, mainly by way of investigation but leading to most important results. The committee hopes that this part of the bill will be carefully examined, for it is the first real recognition of the coordination of water and land transportation which must eventually be accomplished.

Section 11 confers further powers upon the board. These powers are new to our system of regulation but are considered by the committee as essential. They look toward unification in operation where conditions demand either a diversion of traffic or a common use of facilities.

The basis thus established has been the subject of much criticism. On the one hand, it is asserted by the carriers that it is too low and will not enable them to obtain the money which they must have in order to develop their properties and provide further transportation facilities which the country demands. On the other hand, it is asserted, with equal emphasis, by some advocates representing the shippers, that the

basis is too high and will give the carriers a greater revenue than they need or ought to have. There were differences of opinion in the committee with respect to the matter, and it is but fair to say that the basis presented is a compromise of these differences. It is believed, however, that both sides of the controversy somewhat exaggerate the facts, or, rather, fail to take into consideration all the facts which influence the subject. In reaching a conclusion, it ought to be borne in mind that the property to which the basis is to be applied is railway property only; that is, the property which renders the service of transportation. All outside investments by railway companies are excluded. Further, in valuing these properties the commission is to be guided by the rules of the law and is not bound by either capitalization or by what is commonly known in the accounting system of the commission as "property investment accounts."

Those who insist so earnestly that the basis will provide insufficient revenue generally ignore the fact that at the present time there are outstanding more than eleven billions of railway bonds which bear an average interest of about 4½ per cent, and on that part of the value of the property the carriers will save 1 per cent. It must also be remembered that the 5½ per cent basis for a rate district will not give to each carrier in that district 5½ per cent upon the value of its property. To some carriers the return will be much higher and to others correspondingly lower. To illustrate: In the test period for ascertaining compensation under the act of March 21, 1918, the average net annual operating income of the class I railways was 5.2 per cent upon the aggregate property investment account. There are, however, wide differences

when the individual carriers are considered. Under this average, the New York Central System earned 6.09; the Pennsylvania Co., 6.26; the Pennsylvania Railroad, 5.36; the Delaware & Lackawanna, 7.54; the Erie, 3.56; the Baltimore & Ohio, 4.67; the Chicago, Burlington & Quincy, 7.02; the Chicago & North Western, 6.13; the Missouri Pacific, 4.43; the Union Pacific, 6.72; the Southern Pacific, 4.99; the Northern Pacific, 6.27; the Great Northern, 6.70; Atchison, Topeka & Santa Fe, 6.16; Chicago, Milwaukee & St. Paul, 4.71; Chicago, Rock Island & Pacific, 4.72; Chicago Great Western, 1.77; Chicago & Alton, 2.64; Western Pacific, 2.28; Colorado Southern, 3.04; Missouri, Kansas & Texas, 2.81; Texas Pacific, 3.76; Wabash, 2.91; Western Maryland, 2.58; New York, New Haven & Hartford, 5.96; Boston & Maine, 4.80; Cincinnati, Hamilton & Dayton, 1.95; Atlantic Coast Line, 5.76; Seaboard Air Line, 3.68; Southern Railway, 4.12; Louisville & Nashville, 6.32; Illinois Central, 5.48.

The basis adopted by the committee is three-tenths of 1 per cent higher than the basis of the test period; and, assuming, though not conceding, that the value of the property is equal to the aggregate of the property investment accounts, it will yield for all the railways a net operating income of $54,000,000 in excess of the income of the test period.

There were two considerations which led the majority of the committee to believe that this increase is not only warranted but necessary:

First. The railways are being returned to their owners when everything is unsettled and abnormal; when there is suspicion and distrust everywhere. Just what rate of return will enable the carriers to finance themselves under such conditions can not, with certainty, be determined. It was, therefore, felt that some increase over the prewar period is justifiable.

Second. As compared with all kinds of commodities, money is much less valuable than it was a few years ago, and it would seem to be only fair that the returns from railway investments should be reasonably advanced.

The committee, however, recognized that the present situation may be temporary, and that in the course of time the country may be restored to something like its former circumstances, and it provided for this very probable change in the last paragraph of section 6, as follows:

> That in the year 1925 and in every fifth year thereafter the commission shall determine what, under the conditions then existing, constitutes a fair return upon the value of such railway property, and it may increase or decrease the $5\frac{1}{2}$ per centum basis herein prescribed, or the basis for the determination of excess income.

These are the reasons, in chief and in brief, which convinced the committee that the $5\frac{1}{2}$ per cent basis for computing the annual operating income of the carriers is fair and just, both to the public and the railway corporations.

It is obvious that if the law gives to the carriers the assurance of income heretofore mentioned there should be a maximum beyond which an individual carrier shall not be permitted to retain for its own use all it may receive under a given body of rates. Referring to the illustrations already given, it is seen that with uniform rates, and they must be uniform in competitive territories, one carrier will receive an operating income of 2 per cent, another 4 per cent, another 6 per cent, another 8 per cent, and others still more. The bill fixes a standard of excess income and requires the carriers which receive an excess

income (which will hereafter be explained in detail) to pay the excess to the transportation board for uses that have been mentioned and which will be more fully stated in a subsequent paragraph of this report.

Upon this requirement there has been a long-continued and earnest controversy before the committee. It has been contended by eminent lawyers that the provision is unconstitutional in that it takes property without compensation. It has been urged by equally eminent lawyers, and probably more of them, that it is not only constitutional but absolutely necessary if private ownership and operation are to be continued. It would unduly prolong this report to enter upon a review of the authorities or an argument which would embrace all the considerations which are material to the question. It is sufficient to say that a large majority of the members of the committee entertain no doubt with respect to the authority of Congress in establishing this policy. Heretofore the regulation of transportation has been regarded merely as a restriction imposed upon particular carriers. For the first time it is proposed to look upon transportation as a subject of national concern and from a national standpoint. It is the duty of the Government so to exercise its power of regulating commerce among the States and with foreign nations that all parts of a common country shall enjoy adequate transportation facilities at the lowest cost consistent with fairness to the capital invested and to the men who manage and operate these facilities. The commerce of one community, in these days, is deeply involved in the commerce of every community in the land. All the railways we have, or substantially all, must be maintained; and,

from time to time, they must be enlarged and additional facilities must be provided.

If the lawyers who insist that taking excess income is unconstitutional are right in their premises, their conclusion would be unassailable. They assume that all the earnings of a given railway under a prescribed body of rates become the absolute property of the carrier which receives them. This is not true under the system which the bill creates; and, therefore, the conclusion is unsound. If there were but one railway in the country, it would be entirely possible for the regulating commission to fix rates for it under which it could not earn more than 6 or 7 per cent upon the value of its property, but we have a thousand railways; and rates for transportation must be fixed with reference to all of them and to the needs of the people to whom all of them render their service. These conditions make it utterly impossible to fix rates which are reasonable for one carrier, considered apart from all the remainder. It is, therefore, in the competence of Congress to declare that the income which any particular carrier receives beyond a fair return upon the value of its property, it receives as a trustee for the public and not as its own absolute property. If this analysis of the power of regulation is not sustained, then the authority granted in the Constitution is a mere delusion.

With reference to excess income, the bill provides that any carrier receiving a net railway-operating income in any year of more than 6 per cent upon the value of its property, one-half of the excess between 6 and 7 per cent is to be placed in a company reserve fund, and the remaining one-half is to be paid to the transportation board. Of any excess above 7 per cent, one-fourth is to be placed in the company

reserve fund, and the remaining three-fourths is to be paid to the board. When the reserve fund equals 5 per cent of the value of the railway property and is maintained at that amount, one-third of the excess above 6 per cent is to be at the disposition of the carrier for any proper purpose, and two-thirds is to be paid to the board.

The company reserve fund may be drawn upon by the carrier whenever its annual net railway operating income falls below 6 per cent of the value of its property. The reserve fund is, of course, the absolute property of the carrier; and the purpose in requiring it to be created and maintained is to give stability to the credit of the carrier and enable it to render more efficiently the public service in which it is engaged

A REVIEW OF THIS PLAN.

In this regard the bill attempts to accomplish three results:

First: By prescribing a basis of return upon the value of the railway property, to give such assurance to investors as will incline them to look with favor upon railway securities; that is to say, by making a moderate return reasonably certain to establish credit for the carriers.

Second. In making the return fairly certain to secure for the public a lower capital charge than would otherwise be necessary.

Third. In requiring some carriers, which under any given body of rates will earn more than a fair return, to pay the excess to the Government and in so using this excess that transportation facilities or credit can be furnished to the weaker carriers and thus help to maintain the general system of transportation.

To bring about these results, section 4 requires the Interstate Commerce Commission immediately to divide the country into rate districts, having in view the similarity or dissimilarity of transportation and traffic conditions therein and to institute hearings to determine the adequacy of the rates in any such district from the revenue standpoint and considered as a whole. The rule to be applied in passing upon such issues is announced in section 6, wherein it is stated that the rates shall be so adjusted "as nearly as may be so that the railway carriers as a whole allocated to each district and subject to this act shall earn an aggregate annual net railway operating income equal, as nearly as may be, to 5½ per centum upon the aggregate value, as determined in accordance with the provisions hereof, of the railway property of such carriers in the district held for and used in the service of transportation." To this basis the Commission is authorized to add, in its discretion, one-half of 1 per cent upon this value as a current contribution to improvements, betterments, or equipment unproductive in character, but which are customarily charged to capital account. This part of the revenue, however, if raised at all, is, in the future, not to be capitalized by any carrier whose net railway operating income for the year is more than the basis adopted; namely, 5½ per cent.

In section 24 the board is also given control over the issuance of railway securities. It is deemed unnecessary to enlarge upon this subject, because it has been so often before Congress that we are all familiar with it in a general way. The car service act, which is to be administered by the board, is greatly enlarged; and, as now proposed to be amended, will be found in section 34. The thirteenth

paragraph of section 6 of the act to regulate commerce is amended in important particulars, and the administration of that paragraph is given to the board.

Section 45, an entirely new regulation, which is intended to increase our export and coastwise trade by making it easier for the interior shipper to avail himself of the ocean routes, is to be administered by the board.

Having thus indicated the chief duties and powers of the transportation board under the bill, it may be helpful to state some of the reasons which led the committee to the conclusion that it is wise to create this additional tribunal in our regulatory system instead of committing to the Interstate Commerce Commission all the new duties and leaving with it all its present duties.

Every member of the Senate knows that the Interstate Commerce Commission is the most overworked body of men in the Government of the United States; its members are able and industrious, and they labor continuously from the beginning to the end of the year. Nevertheless, they can not keep pace with the demands already made upon them, and, oftentimes, justice delayed is justice denied. The bill the committee has presented increases tremendously the work which some body of men must do if its provisions are promptly carried into effect. It was apparent to the committee that it must adopt one of two alternatives: It must either recommend a very considerable enlargement of the commission, with such division into sections as would permit independent action: or it must recommend the creation of a distinct body. It chose the latter alternative. In determining the division of work, power, and responsibility as between the two bodies, the committee has traced a clear, obvious line. It has not

been able, always, to observe the exact distinction; but, in the main, it has succeeded in doing so.

The bill leaves with the Interstate Commerce Commission the quasi-judicial powers; that is to say, everything pertaining to rates and rate-making will be as heretofore, in the hands of the commission. The valuation of railway property, under the act of 1913, remains with the commission. The accounting or reporting system is to be conducted by the commission as inseparable from rate making. There are many other and most important duties to be performed by the commission, so many, indeed, that the committee has some doubt whether it will be able to do its work promptly. These, however, need not be specified, as a reading of the bill and a familiarity with the existing law will disclose them. The transportation board is given, chiefly, the powers which are more nearly and directly connected with the physical operation of the railways and the issuance of securities, power over the things tending for safety, both to employees and the public. It is believed that the division of powers and duties has been so adjusted that opportunity for conflict or discord is practically excluded. It may be here remarked that one of the most vital powers given to the board relates to the settlement or adjudication of disputes between railway employers and employees; but this part of the bill deserves separate consideration and to that subject the committee now invites your attention.

LABOR PROVISIONS.

It is not necessary to enter upon the details of the establishment of the tribunals created for the adjudication of demands, disputes, and controversies which may arise from time to time between railway corporations and railway employees. These provi-

sions will be found in sections 25, 26, 27, and 28 of the bill. It is sufficient to say that there are to be appointed three regional boards of adjustment and a committee of wages and working conditions. These four tribunals, made up in each instance of an equal number of men nominated by railway crafts and railway corporations, have original jurisdiction of all complaints, demands, disputes, and controversies between employers and employees which are not adjusted or settled between the parties themselves. In the event of the failure of these boards of adjustment or the committee of wages and working conditions to reach a decision, the transportation board has final authority; and, indeed, all decisions of these boards or the committee must be approved by the transportation board. It is intended in these sections to bring into existence governmental tribunals so composed that, in so far as mortal man can do justice, there will be complete, impartial justice done to both railway corporations and railway employees and to the public as well.

Hitherto, the Government has not undertaken to adjudge the disputes which have so disturbed the field of transportation and which promise to be still more serious in the future than they have been in the past. All that legislation has done up to this time has been to authorize mediation and conciliation and to present an opportunity for voluntary arbitration. After the most careful consideration, it is the judgment of the committee that the time has come to make another advance in the settlement of disputes likely to end in the suspension or restraint of transportation. This forward step must be clearly understood in order to be justly considered. In a controversy between railway workers and railway managers with respect to wages and working condi-

tions and which could only be settled by agreement between the disputants, the right to strike, that is, a concerted cessation of work, seems inevitable; for it is the only weapon which the workers could effectually employ. A proposal to prohibit an agreement among workers to quit their employment at a given time without substituting some other instrumentality for securing justice would not receive at the hands of Congress a moment's consideration. In making the strike unlawful, it is obvious that there must be something given to the workers in exchange for it. The thing substituted for the strike should be more certain in attaining justice and should do what the strike can not do; namely, protect the great masses of the people who are not directly involved in the controversy. The committee has substituted for the strike the justice which will be administered by the tribunals created in the bill for adjudging disputes which may hereafter arise.

From the public standpoint and in the interest of the people generally, it has become perfectly clear that, in transportation, at least, both the strike and the lockout must cease. This country has been so developed, its population is so situated, its commerce so crystallized that regularity and continuity in transportation have become absolutely indispensable to the lives and health of the people and the existence of our industrial and commercial welfare. A general suspension in the movement of traffic for a fortnight would starve or freeze, or both, a very large number of men, women, and children; and, if it were continued a month or two months, it would practically destroy half our population. Our business affairs would be so disordered that the loss would be greater than in any conceivable war in which we might

engage. It is just as much the function of the Government in these circumstances to see to it that transportation is adequate, continuous, and regular as it is to maintain order, punish crime and render justice in any other field of human activity. It is clear, therefore, that the Government must settle the controversies between railway managers and railway employees which, if left to be fought out between the parties themselves, will lead to the consequences just described. There is but one way in which this can be done: The Government must undertake to declare, in any such case, what is justice, what is fair and right, between the parties to the dispute, and then there must be no concerted rebellion or conspiracy among those whose rights have been adjudged for the purpose of coercing either of the parties to the dispute into another and different settlement.

The railway unions are especially opposed to these provisions of the bill, and the committee addresses a word directly to them. In the step the committee has taken there is no hostility to unionized labor; no opposition to collective bargaining. Indeed, the unions and collective bargaining are necessary parts of the plan suggested in the bill. The unions can be more effective in securing justice under the proposed arrangement than they ever have been through the strike, for after all, even the most zealous of the union leaders must admit that their efforts through the strike, from their own standpoint, have substantially failed. The existing complaints with respect to wages and working conditions must be sufficient evidence to these leaders that they have not been able to attain their objects in the old way. Why not, then, exchange the instrumentality which they are now insisting upon and which can be tolerated no longer

in a free country for a better one; namely, the justice of an impartial governmental adjudication? The committee is aware that the union leaders feel that they can not hope for justice from the Government, but in the opinion of the committee this distrust has no foundation and ought to give way to confidence and hope. If we can not organize tribunals which will do justice to employees, employers, and to the public in a business which so vitally affects the welfare of the Nation, then the Government is a complete failure and free institutions must be abandoned as an unsuccessful experiment. The committee believes that, when the heat of the immediate conflict over this legislation has subsided, a great majority of the railway workers will hail the substitution of intelligent and impartial tribunals, which will render justice to them, for the right to enter into an agreement or combination to destroy transportation as a deliverance, and as a better way to secure what rightly belongs to them than the methods which they have heretofore employed.

The committee has now reviewed those parts of the bill which propose legislation along lines distinct from those which have been already attempted. There are in the bill many amendments of the act to regulate commerce remedying defects which have been disclosed in the administration of the present law; but it is believed that these corrections need not be specifically enumerated in this report. When the bill is presented in debate, all these matters will be carefully explained.

It is but fair to say that this report has not been considered by the committee. It is the work of the chairman, and he alone must be held responsible for it.

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